

NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHAUNE PATTERSON,

Plaintiff,

No. C 04-0405 PJH

v.

**ORDER GRANTING MOTIONS FOR
SUMMARY JUDGMENT AND GRANTING
MOTION FOR SANCTIONS**

APPLE COMPUTER, INC., et al.,

Defendants.

Defendants' motions for summary judgment and motion for sanctions came on for hearing before this court on July 20, 2005. Plaintiff appeared by her counsel Rachel Orejana, and defendants appeared by their counsel Lynne Hermle. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motions as follows.

INTRODUCTION

This is an employment discrimination case. Plaintiff Shaune Patterson is an African-American lesbian who was formerly employed by defendant Apple Computer, Inc. ("Apple"). Also named as defendants are Apple employees Dan Walker ("Walker"), Sheri Parker ("Parker"), and Steve Burmeister ("Burmeister").

Plaintiff asserts 14 causes of action in the fifth amended complaint ("5thAC") – racial discrimination under 42 U.S.C. § 1981, against Apple; racial discrimination in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, et seq. ("Title VII"), against Apple; racial

1 discrimination, in violation of the Fair Employment and Housing Act ("FEHA"), California
2 Government Code § 12900, et seq., against Apple; violation of the California Equal Pay Act,
3 California Labor Code § 1197.5, against Apple; harassment, in violation of FEHA, against
4 Apple, Walker, and Parker; retaliation, in violation of FEHA, against Apple, Walker, Parker,
5 and Burmeister; failure to take reasonable steps to prevent discrimination from occurring, in
6 violation of FEHA, against Apple; failure to maintain environment free from harassment, in
7 violation of FEHA, against Apple; defamation (slander), against Apple, Walker, and Parker;
8 defamation (libel), against Apple, Walker, and Parker; invasion of privacy, against Apple,
9 Walker, and Parker; wrongful termination in violation of public policy, against Apple; sexual
10 orientation discrimination, in violation of FEHA, against Apple; and genetic characteristic
11 discrimination, in violation of FEHA, against Apple.

12 The four defendants now move for summary judgment as to all claims asserted against
13 them. Plaintiff opposes the motions as to all claims, with the exception of the fourth cause of
14 action for violation of the Equal Pay Act, which she concedes. Apple and Walker also move
15 for sanctions pursuant to Federal Rule of Civil Procedure 11, arguing that the claims alleged
16 against Walker are unwarranted by law and unsupported by any facts.

17 BACKGROUND

18 In 1996, plaintiff's brother Byron Patterson, a long-time friend of defendant Steve
19 Burmeister, asked Burmeister to interview plaintiff for a position at Burmeister's then-
20 employer, PacifiCare. Burmeister interviewed and hired plaintiff, at an annual salary of
21 \$37,000. Burmeister and plaintiff worked well together at PacifiCare, and Burmeister gave
22 her a salary increase. According to plaintiff, she and Burmeister shared interests and
23 background, and discussed many personal issues. Burmeister also socialized with plaintiff's
24 family. Burmeister is gay, and he knew plaintiff was a lesbian before he hired her. Burmeister
25 subsequently left PacifiCare for Rand, where he again recruited and hired plaintiff, at an
26 annual salary of \$55,000.

27 Plaintiff eventually left Rand, because she had determined to become an options
28 trader. However, she remained in contact with Burmeister. When she told him her trading

1 career was not a success, Burmeister told her there might be an opening at Apple, where he
2 was then working. Plaintiff applied for a position, giving Burmeister as a reference. She flew
3 in from Southern California for the interview, and Burmeister picked her up at the airport and
4 drove her to the interview. In May 2001, Apple hired plaintiff as a Compensation Consultant in
5 the Human Resources ("HR") Compensation Group, at a starting salary of \$88,000.
6 According to Burmeister, he pushed for her salary to be larger than initially planned because
7 he was aware that a salary freeze made it difficult to get pay increases at Apple.

8 As a Compensation Consultant, plaintiff was expected to provide different types of
9 employee compensation support services and information to various Apple clients.

10 Compensation employees worked frequently with colleagues from a variety of Apple
11 organizations, and were required to have good interpersonal and communication skills.

12 In February 2002, plaintiff's first supervisor at Apple, Karen Kaufman ("Kaufman"),
13 rated plaintiff as a "solid contributor," which is in the middle rank of Apple's performance
14 evaluations. Kaufman noted that plaintiff had a number of interpersonal difficulties – she
15 needed to work on being more communicative, to participate more in team meetings, and to
16 be more forthcoming with her knowledge. Kaufman also noted comments by plaintiff's
17 colleagues that plaintiff was not flexible or willing to jump in when others needed help.

18 In November 2002, Burmeister became plaintiff's supervisor. According to Burmeister,
19 plaintiff continued to discuss her personal issues with him, including her sexual orientation,
20 weight problems, and medical issues. According to plaintiff, she experienced a lessening of
21 the stress she had felt under prior supervisors.

22 Burmeister offered plaintiff an opportunity to support the Apple Hardware Engineering
23 organization, believing that this opportunity would give her a chance to showcase her skills
24 and build a base of support for her clients. Plaintiff was expected to provide support through
25 market comparisons, to respond to questions about compensation, to complete bonus
26 presentations, and to attend staff meetings. This assignment was not successful. Plaintiff's
27 engineering clients, including Cheryl Smith ("Smith"), an African-American HR Senior Director,
28 found plaintiff to be unresponsive, unhelpful, and rude. Smith believed plaintiff had minimal

1 interpersonal skills. According to Smith, plaintiff frequently responded, “No,” or “That’s not my
2 job,” when Smith sought her assistance. Plaintiff was also resistant to providing data on
3 bonuses, stating that the task was hard. Smith received complaints from her HR team about
4 plaintiff’s attitude and refusal to perform work. These problems caused Smith ultimately to
5 limit her interaction with Smith, and to seek intervention from Burmeister.

6 Judy Goodson (“Goodson”), another African-American HR Director, found plaintiff to be
7 often unavailable, rude, disrespectful, and negative. To create an opportunity for plaintiff,
8 Goodson invited her to make a presentation to a Senior Vice President and his staff.
9 However, plaintiff declined. Plaintiff also refused to attend Goodson’s staff meetings, despite
10 frequent requests from Goodson that she attend. Goodson informed Burmeister of these
11 problems. Despite plaintiff’s flaws, Burmeister states that he did not want to terminate her.
12 Instead, he moved her back to her prior compensation duties, which involved mainly analysis
13 and infrequent personal interaction.

14 According to plaintiff’s colleague Deborah House (“House”), plaintiff was frequently
15 absent from department staff meetings and quarterly HR Department meetings. According to
16 Burmeister, plaintiff was rude to her colleagues in the Compensation Group, prompting
17 Burmeister to counsel her repeatedly about her inappropriate tone, demeanor, and ability to
18 work with others and be a team player.

19 Plaintiff’s work day was also interrupted by ongoing personal appointments and
20 activities. She maintained a standing weekly hair appointment during working hours. Starting
21 in February 2002, she commenced weekly sessions with a psychologist whose office was in
22 Oakland, approximately 60 miles from Apple’s Cupertino offices. She also spent up to and
23 hour and a half a day trading her personal stock portfolio, and at other times played video
24 games and did crossword puzzles on her computer.

25 Plaintiff believed she was entitled to yearly merit increases and promotions. However,
26 Apple had a salary freeze in effect from the time plaintiff was hired until late 2003. Thus, the
27 first opportunity for plaintiff to receive a merit increase was in connection with the review cycle
28 in November 2003. When plaintiff learned that she was not receiving a merit increase, she

1 accessed two Apple databases during work hours to obtain confidential salary and tenure
2 information regarding certain of her colleagues.

3 On November 12, 2003, plaintiff sent an e-mail to defendant Dan Walker, Apple's
4 Chief Talent Officer, requesting that he provide her with a promotion and/or merit increase
5 ("the November 12th e-mail"). The e-mail contained the confidential salary and tenure
6 information that plaintiff had accessed from the Apple databases, and she copied the e-mail
7 (or the information) to her brother, her psychologist, and an attorney she had consulted (but not
8 retained). She did not block out any of the confidential information, such as her colleagues'
9 names and salaries before sending the e-mail.

10 Plaintiff subsequently testified in her deposition that the November 12th e-mail was not
11 a complaint of discrimination, and that she was not implying that she intended to make a claim
12 or initiate a lawsuit. Nevertheless, upon Walker's receipt of the e-mail, Apple became
13 concerned about plaintiff's possible misuse of the information.

14 According to Walker and Burmeister, plaintiff's November 12th e-mail generated
15 concern at Apple because it was apparent that plaintiff had accessed salary and other
16 confidential information regarding her manager and co-workers, and that this information had
17 been accessed for personal purposes, not business purposes. It also appeared that plaintiff
18 had disclosed the confidential information to third parties. Plaintiff was permitted to use her
19 personal laptop computer for business purposes, and, as a result, her laptop contained an
20 extensive compilation of confidential Apple employee information. Thus, Apple became
21 concerned about plaintiff's possible misuse of this confidential information. This concern was
22 heightened when Burmeister entered plaintiff's work area on November 12 to retrieve some
23 documents, and discovered that plaintiff had left sensitive employee data unsecured on a
24 table in her office next to what appeared to be a list of non-Apple personnel.

25 Walker asked defendant Sheri Parker, Apple's Director of Employee Relations, to
26 investigate the e-mail and make an appropriate response. This was consistent with Parker's
27 job duties and responsibilities. Parker then met with Burmeister and discussed the possibility
28 of suspending plaintiff during the investigation, as was common in such situations. Burmeister

1 shared with Parker his concerns about how plaintiff might respond to such a suspension,
2 telling her that Patterson had told him she had “guns,” and had also stated on more than one
3 occasions that if she was ever walked out of the company she would go out in a “blaze of
4 glory.” Parker was concerned, and telephoned David Hull (“Hull”), then an Apple Security
5 Manager, to assess security concerns.

6 During that call, Parker and Hull asked Burmeister to share with them what he knew
7 about plaintiff, including information about plaintiff’s family and personal situation, so they
8 could determine whether plaintiff might be a danger to herself or others. In response,
9 Burmeister discussed how plaintiff might react to being informed that she was being
10 suspended, and answered questions about plaintiff’s state of mind. He mentioned that plaintiff
11 was unhappy for several reasons, and had been taking anti-depressant medication. When
12 asked, Burmeister provided a physical description of plaintiff, stating that she was Black and
13 obese. He also said that she was a lesbian. According to Parker, this information about
14 plaintiff was not shared with anyone other than Parker or Hull.

15 Subsequently, as part of the investigation, plaintiff met with Parker and Hull. Plaintiff
16 confirmed that she had accessed and reviewed her manager’s and co-workers’ salaries and
17 confidential information independent of any business reason. She considered it appropriate
18 to access the information, and admitted that she had distributed the information to her attorney
19 and therapist. She also confirmed that she had chosen to use a personal laptop for her work
20 at Apple, and therefore possessed confidential Apple information on that laptop. At the
21 conclusion of the meeting, Parker told plaintiff she was suspended with pay pending the
22 outcome of the investigation.¹ Parker asked plaintiff whether Apple could inspect her laptop,
23 and plaintiff consented.

24 On November 18, 2003, plaintiff filed a charge of discrimination with the EEOC
25 (charge No. 377-2004-00145), alleging discrimination on the basis of race, and retaliation for
26 engaging in protected activities. She claimed that Walker had suspended her. She

27
28 ¹ While plaintiff was suspended, her building access and network password were disabled
for security purposes, as was standard in such situations.

1 requested immediate closure, and on November 20, 2003, the EEOC issued plaintiff a right-
2 to-sue letter

3 Apple hired independent investigator Rebecca Speer ("Speer") to investigate the
4 compensation and promotion issues plaintiff had raised. Speer is an attorney who consults
5 with companies about employment-related issues. In her initial interview with Speer, plaintiff
6 complained that the failure to promote her or increase her salary was inequitable because she
7 believed it "didn't make sense" for her not to receive a raise or promotion. She reiterated the
8 position she had taken in the November 12th e-mail, which was that she could think of no
9 rational reason for her not to receive a promotion, in view of the fact that her responsibilities
10 had grown and that three different managers had promised her she would receive a
11 promotion. She then told Speer that the only difference between her and those who had
12 received promotions was "race." In addition to interviewing plaintiff, Speer also interviewed
13 Walker, Burmeister, Kaufman, Valerie Williams ("Williams" – a former Compensation
14 Director), Smith, Goodson, and Denise Young Smith (a former Director of Employee
15 Relations).

16 In the course of the ongoing internal Apple investigation, Parker met with Burmeister
17 and several Compensation Group employees regarding department policy. She did not
18 reveal to them (except possibly Burmeister) that she was investigating plaintiff's conduct.
19 According to Parker, her investigation revealed that employees in the Compensation Group
20 understood that it was not appropriate for them to access the confidential salary information of
21 co-workers for non-business-related purposes (although there was apparently no explicit
22 written policy in effect). Parker concluded that plaintiff's conduct had been improper and that
23 she had exhibited poor judgment. Nevertheless, she says she gave plaintiff the benefit of the
24 doubt, and recommended that she not be disciplined. Burmeister accepted this
25 recommendation and did not discipline plaintiff, and plaintiff returned to work after four weeks
26 of (paid) suspension.

27 Speer sent a copy of the report of her investigation to Apple on January 8, 2004. The
28 report reflects that plaintiff's claim that "three different managers" had promised her a

1 promotion was not accurate. The report indicates that in July or August 2001 (i.e., two or three
2 months after plaintiff was hired at Apple), Williams and Kaufman had asked plaintiff to assume
3 responsibility for additional client groups, prompting plaintiff to ask how that would affect her
4 salary and title. According to plaintiff, both said in independent conversations, "We'll see."

5 Speer's report further reflects that in May 2002, plaintiff again approached Williams to
6 ask about a promotion, and Williams told her salaries were frozen and that she would review
7 her compensation and title at the next review cycle (November 2003). In January or February
8 2003, however, Apple announced that a merit review would take place in March 2003.

9 Plaintiff again raised the subject of a raise with Burmeister. According to Speer's report,
10 plaintiff claimed that Burmeister told her the merit review would take place in November, and
11 at that time, both she and House would receive promotions and raises. However, in his
12 deposition, Burmeister subsequently vehemently denied having told plaintiff that either she or
13 House would receive a raise in November 2003. Burmeister also denied plaintiff's
14 description of her job duties (as claimed in the November 12th e-mail).

15 Speer reported that Burmeister had explained that he had not granted plaintiff a raise
16 in November 2003 because plaintiff was rated "solid contributor," not "significant contributor"
17 or higher; and because plaintiff was already fairly compensated, as she had come in at a high
18 level. Burmeister stated that Walker's organization (the HR-related groups) had received only
19 a small pool of funds for merit increases, and that Walker had told Burmeister to limit raises
20 and/or promotions to those who had made a "significant" contribution.

21 Speer concluded that there was no merit to plaintiff's claim that she had been unfairly
22 denied a salary increase and promotion. Speer looked at the other employees mentioned in
23 plaintiff's e-mail, and found that Burmeister had applied the same criteria to those as to
24 plaintiff. Only House had received an increase, because of her superior performance and
25 because of her extraordinary level of responsibility. Speer also looked at the employees that
26 plaintiff had pointed out as earning more money than she did, and set forth Burmeister's
27 reasons for paying those employees at a higher rate.

28 Plaintiff returned to work in late December 2003 or early January 2004. On January 8,

1 2004, she sent another e-mail to Walker, complaining of retaliation for having “fil[ed] a
2 complaint of racial discrimination.” She copied the e-mail to Burmeister, Fred Anderson
3 (Apple’s then-CFO), and her attorney, Waukeen McCoy. In the e-mail, plaintiff complained
4 that her suspension and Parker’s investigation were retaliatory, and that Parker’s investigation
5 also invaded her privacy and set her up for “public censure” as it involved a search of her
6 office, a confiscation of her personal laptop, interviews with her peers, harassing questions by
7 Parker, and an attempt to “freeze” out her attorney.

8 Plaintiff also asserted that certain written guidelines that had been distributed at a
9 December 15, 2003, HR staff meeting – regarding access by HR employees to confidential
10 employee information – implicitly communicated to co-workers that plaintiff had done
11 something wrong. Finally, she claimed that Walker and Parker had cut her responsibilities to
12 10% of the duties she had before her suspension, and denied her access to information she
13 needed for her work. Apple again retained Speer to investigate plaintiff’s allegations.

14 On January 28, 2004, plaintiff filed a three charges of discrimination with DFEH. In the
15 first, E200304-G-0644-00cr, plaintiff alleged that she had been harassed, denied a
16 promotion, denied equal pay, and retaliated against by Walker, because of her race. The
17 same day, DFEH provided plaintiff with a notice of case closure and right-to-sue letter.

18 In the second charge, E200304-G-0644-01rc, plaintiff alleged that she had been
19 harassed, denied a promotion, denied equal pay, and suspended from work on November 13,
20 2003, by Walker, because of her race. The same day, DFEH provided plaintiff with a notice
21 of case closure and right-to-sue letter

22 In the third charge, E200304-G-0644-02rc, plaintiff alleged that she had been
23 harassed, denied a promotion, denied equal pay, and suspended from work by Walker and
24 Parker, because of her race. The same day, DFEH provided plaintiff with a notice of case
25 closure and right-to-sue letter. Plaintiff filed the present action on January 29, 2004.

26 On February 9, 2004, Speer sent Apple the report of her second investigation. Speer
27 found that the concerns stemming from plaintiff’s handling of confidential employee
28 information – and not a desire to retaliate against her – led to the decision to suspend her and

1 conduct an investigation. Speer concluded that none of plaintiff's allegations had merit.

2 In early 2004, Walker told Burmeister and other managers within HR that they had to
 3 cut several hundred thousand dollars from their budgets. Consequently, Burmeister made the
 4 decision to lay off three of the seven employees who reported to him. Plaintiff was laid off on
 5 March 5, 2004, along with two other employees who had worked at Apple longer than plaintiff
 6 had. When plaintiff was laid off, her duties were reassigned to her remaining colleagues in the
 7 Compensation Group. No one was hired to replace her. Moreover, when another
 8 Compensation Group employee left the group about a month later, that position was not filled.
 9 Like her colleagues, plaintiff was offered two months' pay as severance. Neither Walker nor
 10 Parker were involved in the decision to lay off plaintiff.

11 On November 10, 2004, plaintiff filed an amended administrative charge, E200304-G-
 12 0644-00cr, to amend the three charges that had originally been filed on January 28, 2004. In
 13 the amended charged, she alleged that Steve Burmeister had discriminated against her on
 14 the basis of sexual orientation and genetic characteristic, when he laid her off on March 5,
 15 2004.

16 MOTIONS FOR SUMMARY JUDGMENT

17 A. Legal Standard

18 Summary judgment is appropriate when there is no genuine issue as to material facts
 19 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Material
 20 facts are those that might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477
 21 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient
 22 evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The court may
 23 not weigh the evidence, and is required to view the evidence in the light most favorable to the
 24 nonmoving party. Id.

25 A party seeking summary judgment bears the initial burden of informing the court of the
 26 basis for its motion, and of identifying those portions of the pleadings and discovery
 27 responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v.
 28 Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at

trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. Id.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 250. "To show the existence of a 'genuine' issue, . . . [a plaintiff] must produce at least some significant probative evidence tending to support the complaint." Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 963 (9th Cir. 1990) (quotations omitted). The court must view the evidence in the light most favorable to the non-moving party. United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003). The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999).

Deference to the non-moving party has some limits. Thus, a plaintiff cannot rest on the allegations in her pleadings to overcome a motion for summary judgment. Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995); Ghebreselassie v. Coleman Sec. Serv., 829 F.2d 892, 898 (9th Cir. 1987). Self-serving affidavits will not establish a genuine issue of material fact if they fail to state facts based on personal knowledge or are too conclusory. Rodriguez v. Airborne Express, 265 F.3d 890, 902 (9th Cir. 2001).

Regardless of whether plaintiff or defendant is the moving party, each party must "establish the existence of the elements essential to [its] case, and on which [it] will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

B. Defendants' Motions for Summary Judgment

The four defendants – Apple, Walker, Parker, and Burmeister – seek summary judgment on all causes of action asserted against them.

1. Racial discrimination

In the first, second, and third causes of action, plaintiff alleges claims of racial

1 discrimination against Apple under 42 U.S.C. § 1981, Title VII, and FEHA, asserting that she
2 was denied a promotion and a salary increase because of her race. Title VII and FEHA
3 claims are analyzed under the same legal theory. See Brooks v. City of San Mateo, 229 F.3d
4 917, 923 & n.3 (9th Cir. 2000). Claims of employment discrimination under § 1981 require
5 the same elements of proof as Title VII cases. Lowe v. City of Monrovia, 775 F.2d 998, 1010
6 (9th Cir. 1985); see also Maduka v. Sunrise Hosp., 375 F.3d 909, 912 (9th Cir. 2004) (same
7 analysis applies to Title VII and § 1981 discrimination claims).

8 In a disparate treatment case, the plaintiff must show that intentional discrimination was
9 the determinative factor in the adverse employment action. Hazen Paper Co. v. Biggins, 507
10 U.S. 604, 610 (1993). There are two ways of proving intentional discrimination – 1) direct
11 evidence and 2) indirect or circumstantial evidence, invoking the McDonnell-Douglas analysis.

12 Direct evidence is evidence that proves the fact of discriminatory animus without
13 inference or presumption. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998).
14 In most cases, however, there is no direct evidence of discrimination by the employer, and
15 discrimination claims must be proved indirectly (circumstantially). In such cases,
16 discrimination claims are analyzed under an allocation of burdens of production and proof,
17 based on the model set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

18 Under the McDonnell-Douglas framework, the burden of production first falls on the
19 plaintiff to make out a prima facie case of discrimination. She may do so by showing that (1)
20 she belongs to a protected class, (2) she was qualified for the position she held (or for the
21 position to which she wished to be promoted and for which she applied), (3) she was
22 terminated or demoted from (or denied a promotion to) that position, and (4) the job went to
23 someone outside the protected class. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506
24 (1993); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004).

25 The burden of production then shifts to the employer, who must present evidence
26 sufficient to permit the factfinder to conclude that the employer had a legitimate,
27 nondiscriminatory reason for the adverse employment action. St. Mary's Honor Center, 509
28 U.S. at 506-07. If the employer does so, the plaintiff must demonstrate that the employer's

1 articulated reason is a pretext for unlawful discrimination by either directly persuading the
2 court that a discriminatory reason more likely motivated the employer or indirectly by showing
3 that the employer's proffered reason is unworthy of credence. Texas Dep't of Community
4 Affairs v. Burdine, 450 U.S. 248, 256 (1981); see also Aragon v. Republic Silver State
5 Disposal, Inc., 292 F.3d 654, 658-59 (2002) (en banc).

6 Here, Apple seeks summary judgment on the claims of racial discrimination, arguing
7 that plaintiff cannot establish either a prima facie case or pretext, on either the claim of failure
8 to promote or the claim of failure to increase plaintiff's salary. Apple first argues that plaintiff
9 cannot establish a prima facie case of failure to promote because she cannot show that she
10 applied for a specific promotion, that she was qualified for the Senior Compensation Analyst
11 position to which she claims she wished to be promoted, or that she applied for but did not
12 receive the promotion in question. In addition, Apple asserts that because plaintiff fails to
13 show that she was more qualified than House, the only person that Burmeister promoted, she
14 cannot establish a prima facie case.

15 In response, plaintiff asserts that she has established a prima facie case because she
16 has shown that she is a member of a protected class who performed competently. She
17 argues that has met her "competence burden" by showing that she received a rating of "solid
18 contributor." She also notes that Burmeister indicated that she was "smart," and hired or
19 recommended that she be hired into two positions after he had worked with her at PacifiCare.
20 She argues that she is not required to show that she formally applied for a promotion because
21 it was not the practice at Apple to list available positions. For example, she claims that when
22 Burmeister needed to fill a position, he interviewed candidates who had "expressed an
23 interest" in the position. She also asserts that House did not actually apply for the promotion
24 that she received from Burmeister. She claims that it was common for Apple employees to
25 take on additional responsibilities prior to being given a promotion, and argues that she
26 herself had the right to expect promotion based on the fact that she took on extra
27 responsibilities.

28 Apple contends that even if plaintiff has made a minimally sufficient showing of the

1 prima facie case, Apple's failure to promote her was based on legitimate, nondiscriminatory
2 reasons that had nothing to do with plaintiff's race – specifically, that plaintiff was not qualified
3 for the Senior Compensation Analyst position and had significant communication and
4 leadership issues that precluded promotion. Burmeister, who was aware of plaintiff's race,
5 hired or recommended her for three jobs in which she worked directly under him; evaluated
6 her performance as satisfactory over time, granting her substantial salary increases at jobs
7 prior to her employment at Apple; and had a long-term social relationship with her and her
8 family.

9 Plaintiff responds that Apple's articulated explanation is pretextual. She asserts that
10 the fact that there was only one African-American Compensation Consultant in her work group
11 is evidence of pretext, as is the fact that Burmeister made racially disparaging comments.

12 Apple also argues that plaintiff cannot show that she was more deserving of a raise
13 than Deborah House, the only employee in the Compensation Group who did receive a raise.
14 Apple contends that although plaintiff may have believed she deserved a raise, the evidence
15 shows that she did not meet the criteria for analyst skills, teamwork, communication skills, or
16 responsiveness, as demonstrated by the criticism in her performance review and in the
17 complaints of her co-workers. Burmeister, who made the recommendation that House
18 receive a raise in November 2003 and that plaintiff not receive a raise, stated that House's
19 performance was exceptional while plaintiff was ranked only "solid performer."

20 In response, plaintiff does not address Apple's arguments regarding her qualifications.
21 She reiterates that there was only one African-American Compensation Consultant in her
22 group at Apple. She also claims that her non-African-American counterparts were paid more
23 than she was, despite her "more extensive education" and experience.

24 In reply, Apple notes that plaintiff has failed to address any of Apple's arguments with
25 regard to the claim of failure to increase salary because of race. Specifically, Apple contends
26 that plaintiff does not respond to the argument that she was not more qualified for a raise than
27 Deborah House, the only employee in the Compensation Group who did receive a raise.
28 Apple asserts that plaintiff also fails to provide competent evidence showing that House was

1 performing comparable work to the work plaintiff was doing.

2 Apple also argues that plaintiff did not receive a salary increase for legitimate non-
3 discriminatory reasons. Apple provides evidence showing that it had a salary freeze in effect
4 until November 2003, at which time plaintiff did not meet the standard for a pay increase
5 because she had received only a “solid” on her performance review and had significant
6 communication and leadership issues. Apple contends that the salaries of other employees
7 in the Compensation Group are irrelevant to plaintiff’s claim that she did not receive a pay
8 raise on one particular occasion. Apple also asserts that the fact that Burmeister hired
9 plaintiff into several different jobs, over the years, with ever-increasing salaries, dispels any
10 suggestion that he harbored discriminatory animus toward her on account of her race. And as
11 with the claim of failure to promote, the fact that plaintiff was the only African-American in the
12 group is irrelevant, or, at most, suggest non-discrimination, as five of the six employees who
13 did not receive raises were non-African-Americans.

14 The court finds that plaintiff has not provided sufficient evidence to show that Apple’s
15 explanation regarding the failure to promote her or the failure to increase her salary was
16 pretextual. A plaintiff may meet the burden of showing pretext by using either direct or
17 circumstantial evidence. See Burdine, 450 U.S. at 256. Direct evidence typically consists of
18 clearly sexist, racist, or similarly discriminatory statements or actions by the employer.
19 Coghlan v. American Seafoods Co. LLC, 413 F.3d 1090, 1095 (9th Cir. 2005). Because
20 direct evidence is so probative, the plaintiff need offer “very little” direct evidence to raise a
21 triable issue sufficient to defeat summary judgment. Id.

22 Circumstantial evidence is evidence that requires an additional inferential step. It can
23 take two forms. See id. The plaintiff can make an affirmative case that the employer is
24 biased, based, for example, on statistical evidence that points to bias. Aragon, 292 F.3d at
25 663. Alternatively, the plaintiff can provide evidence that shows that the employer’s proffered
26 explanation for the adverse action is “unworthy of credence.” Burdine, 450 U.S. at 256. When
27 a plaintiff relies on circumstantial evidence – or evidence that negatively discredits the
28 employer’s stated rationale – that evidence must be “specific and substantial” in order to

1 defeat a motion for summary judgment. Coghlan, 413 F.3d at 1095; see also Stegall v.
2 Citadel Broadcasting Co., 350 F.3d 1061, 1066 (9th Cir. 2004).

3 Here, plaintiff attempts to make her case with both direct and circumstantial evidence.
4 As direct evidence, she provides a declaration in which she states that Burmeister made
5 racially derogatory comments. However, she was able to recall only three such comments by
6 Burmeister over all the years that she had known him – the statement that African-Americans
7 “couldn’t have a house party without shooting up the neighborhood;” the statement that
8 African-Americans are somehow involved in “shooting up the screens at movie theaters;” and
9 the statement that “every time we [presumably referring to African-Americans] were
10 interviewed on television they always seemed to get the person who’s in curlers, missing
11 teeth.” These stray remarks are not evidence of discrimination. Horn v. Cushman &
12 Wakefield Western, Inc., 72 Cal. App. 4th 789, 810 (1999). In general, stray remarks not
13 acted upon or communicated to a decision maker are insufficient to establish pretext.
14 Mondero v. Salt River Project, 400 F.3d 1207, 1213 (9th Cir. 2005). There is no evidence that
15 the comments attributed to Burmeister were directed at her or at any other Apple employee,
16 or were uttered in any employment-related context.

17 Plaintiff provided no evidence that anyone else at Apple made racially disparaging
18 comments, or that anyone at Apple took any action based on her race. Burmeister’s
19 comments, while tasteless, are not sufficient on their own to provide specific and substantial
20 evidence of pretext, particularly in view of the fact that plaintiff testified in her deposition that
21 she never believed that Burmeister harbored any animus against African-Americans based on
22 race. When she was asked in her deposition whether Burmeister’s conduct toward her was in
23 any way connected with her race, plaintiff testified that, in her view, Burmeister’s conduct
24 towards her “was because someone else was using it as a racial bias and he went along with
25 it.” Moreover, it is undisputed that it was Burmeister who hired or recommended plaintiff for
26 three jobs in which she worked under him, who evaluated her performance as satisfactory
27 over time, who granted her substantial salary increases at jobs prior to her employment at
28 Apple, and who had a long-standing social relationship with her and her family.

1 Plaintiff's effort to provide circumstantial evidence is even less effective, as she relies
2 entirely on the assertion that she was the only African-American in her department. A
3 statistical incident of one in a seven-person department is not significant. Statistics are
4 probative only if they are based on a sufficiently large sample size, see Aragon, 292 F.3d at
5 663, which is not the case here.

6 The court finds that summary judgment must be GRANTED on the claims of racial
7 discrimination because plaintiff has failed to provide evidence showing that Apple's
8 explanation for the failure to promote her and failure to give her an increase in salary was
9 pretextual.

10 2. Harassment

11 In the fifth cause of action plaintiff alleges harassment on the basis of race against
12 Apple, Walker, and Parker. She asserts that by "creating, maintaining, encouraging, failing to
13 investigate properly, and by failing to remedy a hostile work environment," defendants violated
14 FEHA. Plaintiff claims that defendants Apple, Walker, and Parker "created several new
15 policies targeting plaintiff's habits" – specifically, that defendants changed starting and ending
16 times for the workday, which impacted plaintiff but no other employees. She claims that these
17 changes prevented her from attending her therapy appointments. She asserts that after she
18 complained about differential treatment, Apple, Walker and Parker disabled her network
19 password and building access card, removed the nameplate from her door, interrogated her
20 co-workers about her, and reduced her workload drastically.

21 Under FEHA, it is unlawful for an employer to harass any employee based on race.
22 Cal. Gov. Code § 12940, subd. (j)(1). Harassment is distinct from discrimination. Janken v.
23 GM Hughes Electronics, 46 Cal. App. 4th 55, 64-65 (1996). To establish a prima facie case
24 of harassment, plaintiff must show that she was subject to a hostile work environment based
25 on her race, and that the harassment was sufficiently pervasive so as to alter the conditions of
26 employment and create an abusive work environment. Doe v. Capital Cities, 50 Cal. App. 4th
27 1038, 1045 (1996).

28 "[H]arassment consists of conduct outside the scope of necessary job performance,

1 conduct presumably engaged in for personal gratification, because of meanness or bigotry, or
2 for other personal motives. Harassment is not conduct of a type necessary for management of
3 the employer's business or performance of the supervisory employee's job." Janken, 46 Cal.
4 App. 4th at 63. Harassment may include racial epithets and racially derogatory comments;
5 physical interference with normal work movement; and racially derogatory posters, cartoons or
6 drawings. 2 Cal. Code Regs., § 7287.6, subd. (b)(1); see also Janken, 46 Cal. App. 4th at
7 63.

8 By contrast, making a personnel decision is conduct of a type fundamentally
9 different from the type of conduct that constitutes harassment.

10 Commonly necessary personnel management actions such as hiring and firing,
11 job or project assignments, office or work station assignments, promotion or
12 demotion, performance evaluations, the provision of support, the assignment or
13 nonassignment of supervisory functions, deciding who will and who will not
attend meetings, deciding who will be laid off, and the like, do not come within
the meaning of harassment.

14 Janken, 46 Cal. App. 4th at 64-65.

15 In its motion, Apple asserts that its potential liability is derived from the alleged conduct
16 of Walker and Parker, and so refers to the motions to dismiss filed by those two defendants.

17 a. Walker

18 Walker was the Chief Talent Officer at Apple, responsible for all human resources
19 functions. During the time plaintiff was at Apple, Walker held quarterly HR staff meetings
20 which plaintiff and other members of the HR Department attended. Plaintiff testified in her
21 deposition that at each of the meetings she attended, Walker discussed his goal of increasing
22 diversity at Apple. He discussed various organizations, including the Black MBA Association,
23 that he was working with to increase diversity hiring. Smith and Goodson (both African-
24 American) state in their declarations that Walker was committed to encouraging and
25 supporting diversity at Apple and providing opportunities for minorities, including African-
26 American women.

27 Walker had four Senior Directors reporting to him. Two were African-American
28 women, one was Asian, and one was Caucasian. Walker had promoted each of those

1 individuals into their positions. Eight of the thirteen people who reported directly to Walker
2 were members of minority races, and four of those were African-American.

3 Walker testified that he and plaintiff had only two direct interactions during the time
4 plaintiff was employed at Apple. Plaintiff testified that she had “two or three” conversations
5 with Walker, consisting of “basic idle chitchat.” She recalled the subjects as “[t]he weather or
6 the final bonus promotion report that I gave a presentation to him on one occasion, and then to
7 Fred on the other occasion.” She stated that Walker told her she had done a good job on the
8 report, and that he was “bragging to everyone about the report.” She said she had no other
9 communications with Walker, and admitted that he never harassed her directly – not face-to-
10 face, not through an e-mail, not through a phone call.

11 Walker argues that the race harassment claim against him is baseless. First, he
12 asserts that he did not participate in any of the actions that plaintiff alleges as “harassment.”
13 He contends that plaintiff has no evidence showing that he created a Compensation Group
14 work policy, and as confirmed by his deposition testimony, he was not involved in the
15 promulgation of the policy. He claims there is no evidence that he interrogated any of
16 plaintiff’s co-workers about her, and he testified in his deposition that he did not. He also
17 asserts that there is no evidence that he prevented plaintiff from attending her therapy
18 appointments, and he asserts in his declaration that he did not. Moreover, he contends that
19 the evidence shows that plaintiff continued to see her therapist until April 2004, when she
20 stopped herself because of her financial situation. Finally, he argues that there is no evidence
21 that he disabled plaintiff’s access during her suspension or removed her nameplate from her
22 door, and he states in his declaration that he did not. Indeed, as plaintiff admitted in her
23 deposition, Walker himself took no action to harass her.²

24 Walker argues further that plaintiff’s harassment claim is not actionable race
25 harassment because the actions about which plaintiff complains can all be considered
26

27 ² Walker does not mention the allegation that plaintiff’s job duties were severely curtailed
28 after she returned from the suspension, but plaintiff provides no evidence that Walker was
involved in any decision regarding her job duties.

1 personnel management activity related to the workplace investigation that followed plaintiff's
2 misuse of confidential data. Under California law, a manager cannot be individually liable for
3 damages based on personnel management activity unless the liability arises from statute.
4 Janken, 46 Cal. App. 4th at 66.

5 Walker contends that even if the alleged conduct is not personnel management activity,
6 it is neither severe nor pervasive. Whether harassment is sufficiently severe or pervasive
7 must be judged by an objective standard. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22
8 (1993). Walker argues that these activities, which he claims were accompanied by no
9 shouting or even rudeness, cannot be considered severe or pervasive.

10 Finally, Walker claims that there is no evidence of racial animus on his part. He asserts
11 that even if plaintiff could prove that he engaged in any of this conduct (which she cannot), and
12 even if the conduct could be considered sufficiently severe and pervasive (which it cannot),
13 there are no facts whatsoever to suggest that Walker held any animus against African-
14 American employees. He maintains that, indeed, the reverse is true, as the evidence shows
15 that Walker was committed to workplace diversity, recruited and hired qualified African-
16 American employees, and promoted employees who were members of minority races.

17 In opposition, plaintiff argues that there is evidence that Burmeister made a number of
18 derogatory comments about African-Americans, including comments to the effect that Black
19 people, especially Black women, are "so fat." Plaintiff claims that such comments are "the
20 epitome of conduct engaged in for meanness or bigotry." Plaintiff also asserts that Walker
21 testified that he gave Burmeister free reign "as long as [he] was not violating wage and hour
22 laws."³

23 The court finds that the motion must be GRANTED as to Walker. Plaintiff has not met
24 her burden of showing that Walker personally engaged in harassing conduct that was so
25 severe or pervasive as to alter the conditions of her employment, or that he engaged in any
26 conduct that was motivated by racial animus. She does not dispute Walker's assertion that

27
28 ³ This is the total of plaintiff's argument regarding harassment, and applies to both Walker and Parker.

1 any action allegedly taken by Walker was personnel management activity for which a
2 supervisory employee cannot be liable as a matter of law. She does not dispute that the
3 actions allegedly taken against her were neither severe nor pervasive, and she provides no
4 evidence that any conduct engaged in by Walker was due to her race, or that Walker even
5 engaged in the conduct that she alleges was harassing.

6 The sole piece of evidence plaintiff cites in support of her claim that Walker harassed
7 her is the alleged derogatory comments made by Burmeister, who is not even named as a
8 defendant in the harassment cause of action. California courts have long held that a
9 supervisor cannot be sued individually under FEHA for harassment by another employee,
10 even where the plaintiff actually complains to the supervisor about the alleged harassment.
11 See Fiol v. Doellstedt, 50 Cal. App. 4th 1318, 1325-28 (1996); Janken, 46 Cal. App. 4th at
12 64. There is no evidence, moreover, that Walker had any knowledge of these alleged
13 harassing comments by Burmeister. Nor is there any evidence that plaintiff made any
14 complaints about the alleged comments, either to Burmeister or Walker.

15 b. Parker

16 Parker makes three arguments in support of her motion. She argues, first, that all
17 activity alleged against her (regardless of whether it occurred) pertains to day-to-day
18 management activity, which does not constitute harassment. Second, she contends that the
19 conduct alleged against her is not severe or pervasive, judged under an objective standard.
20 She asserts that plaintiff alleges no conduct involving shouting, slurs, or even impolite conduct,
21 and that the activities mentioned by plaintiff simply therefore cannot objectively be considered
22 severe or pervasive.

23 Third, Parker argues that there is no evidence that any of her alleged conduct was tied
24 to plaintiff's race. Parker contends that plaintiff has no evidence that Parker harbored animus
25 against African-Americans. Parker asserts that plaintiff's only "evidence" that Parker
26 discriminates on the basis of race is plaintiff's belief that Parker considered plaintiff's
27 November 12 e-mail to Walker to constitute a discrimination claim. Parker argues that
28 plaintiff's opinion as to whether an e-mail is a discrimination claim is not probative of whether

1 Parker discriminates.

2 Plaintiff makes the same arguments in opposition to Parker's motion as she did in
3 opposition to Walker's. She contends that Burmeister made a number of derogatory
4 comments about African-Americans, including comments to the effect that Black people,
5 especially Black women, are "so fat." Plaintiff claims that such comments are "the epitome of
6 conduct engaged in for meanness or bigotry." Plaintiff also asserts that Walker testified that
7 he gave Burmeister free reign "as long as [he] was not violating wage and hour laws."

8 The court finds that the motion must be GRANTED as to Parker. As with the claim
9 against Walker, Plaintiff does not dispute that any conduct allegedly taken by Parker was
10 personnel management activity for which a supervisory employee cannot be liable as a matter
11 of law; does not dispute that the conduct allegedly taken against her was neither severe nor
12 pervasive; provides no evidence that the conduct was taken on account of plaintiff's race; and
13 fails to provide any evidence that Parker even engaged in the conduct alleged to be
14 harassing. As with Walker, plaintiff has not met her burden of showing that Parker personally
15 engaged in harassing conduct that was so severe or pervasive as to alter the conditions of her
16 employment, or that she engaged in any conduct that was motivated by racial animus.

17 The motion must also be GRANTED as to Apple, as Apple's liability depends on the
18 liability of Walker and Parker. While it is true that an employer is strictly liable for harassment
19 of an employee by a supervisor, State Dep't of Health Servs. v. Superior Court, 31 Cal. 4th
20 1026, 1041 (2003), the court's finding that summary judgment must be granted as to both
21 Walker and Parker on the harassment claim necessarily means that Apple's motion must also
22 be granted.

23 3. Retaliation

24 In the sixth cause of action, plaintiff alleges a claim of retaliation against Apple, Walker,
25 Parker, and Burmeister. She asserts that she complained to defendants on numerous
26 occasions that she was being harassed and denied promotional opportunities based on her
27 race. She alleges that defendants "had numerous opportunities to remedy the hostility of their
28 workplace, but Apple, through its management level employees and agents, chose to engage

1 in a campaign of intimidation, harassment and abuse as alleged.”

2 She asserts that after she complained about “differential treatment and compensation,
3 Walker and Parker created several new policies regarding employee attendance, which she
4 claims targeted her “habits.” Specifically, she alleges that Walker, Parker, and Burmeister
5 prevented her from attending therapy sessions. She alleges that the timing of these changes,
6 combined with the fact that she was the only employee affected, clearly indicates that they
7 were designed to retaliate against her for complaining about differential treatment to
8 supervisors, as well as to the DFEH. She alleges further that after she complained about
9 differential treatment and compensation, Apple, Walker, and Parker disabled her network
10 password and building access card, and that Walker and Parker removed the nameplate from
11 her door, interrogated her co-workers about her, and drastically reduced her workload.

12 California Government Code § 12940, subdivision (h) makes it unlawful for any
13 employer “to discharge, expel, or otherwise discriminate against any person because the
14 person has opposed any practices forbidden under this part or because the person has filed a
15 complaint, testified, or assisted in any proceeding under this part.” Subdivision (a) of the
16 statute specifies the prohibited employment practices, which include harassment and
17 discrimination because of race, sex, religion or national origin.

18 California courts apply the traditional McDonnell-Douglas shifting-burdens analysis in
19 cases alleging violation of state anti-discrimination laws. See, e.g., Nelson v. United Tech., 74
20 Cal. App. 4th 597, 613 (1999). To establish a prima facie case of retaliation in violation of
21 FEHA,⁴ a plaintiff must show that she engaged in a protected activity, that the employer
22 subjected her to an adverse employment action, and that a causal link existed between the
23 protected activity and the adverse action. Yanowitz v. L’Oreal USA, Inc., 36 Cal. 4th 1028, 32
24 Cal. Rptr. 3d 436, 444-45 (2005). Once a prima facie case has been established, the burden
25 shifts to the defendant to offer a legitimate non-retaliatory explanation for its conduct. If the
26 defendant offers a legitimate, non-retaliatory reason, the burden then shifts back to the plaintiff

27 _____
28 ⁴ Under California law, requisites for proving unlawful retaliation under FEHA are the same
as for Title VII. Flait v. North Am. Watch Corp., 3 Cal. App. 4th 467, 475-76 (1992).

1 to show that the proffered explanation is merely a pretext for retaliation. Flait, 3 Cal. App. 4th
2 at 476.

3 In its motion, Apple asserts that its potential liability is derived from the alleged conduct
4 of Walker, Parker, and Burmeister, and so refers to the motions to dismiss filed by those
5 defendants.

6 a. Walker

7 Plaintiff claims that Walker retaliated against her for sending the November 12th
8 e-mail by changing company policies that affected her (by preventing her from attending
9 therapy sessions), by conducting an investigation into her disclosure of confidential employee
10 information (which included questioning other employees) and by suspending her (which
11 included blocking her network and employee access, removing her name from the door, and
12 possibly reducing her workload). She also suggests that the suspension pending the internal
13 investigation of her misuse of confidential information, and the March 2004 lay-off were
14 retaliatory.

15 Walker argues that plaintiff cannot establish a prima facie case of retaliation because
16 she cannot show she engaged in protected activity or that she suffered an adverse action by
17 Walker. "Protected activities" fall into two categories: 1) opposing any practices forbidden
18 under FEHA; and 2) filing a complaint, testifying, or assisting in any FEHA proceeding. Cal.
19 Gov. Code, § 12940(h). Opposing practices prohibited by FEHA includes 1) opposing
20 employment practices which an individual reasonably believes to be an FEHA violation; and
21 2) participating in an activity which is perceived by the employer as opposition to
22 discrimination. Cal. Admin. Code Tit. 2, § 7287.8(a)(1)(C), (D).

23 Walker argues that the sending of the November 12th e-mail cannot be considered
24 "filing a complaint" because plaintiff testified in her deposition that her intention in sending the
25 e-mail was not to complain that she had been the victim of race discrimination or of any other
26 type of discrimination, but rather to ask Walker to reconsider and give her a raise or a
27 promotion. In addition, she acknowledged that she could not have been participating in a
28 "protected activity" at the time she sent the e-mail because no investigation or proceeding

1 existed.

2 Walker also contends that plaintiff did not engage in “oppositional” activities because
3 she was not opposing a practice made unlawful by Title VII or FEHA. Walker asserts that a
4 demand for a specific outcome – here, a raise and promotion – that is not tied to actual
5 discrimination cannot be protected activity. Walker argues in addition that the act of sending
6 confidential information outside of Apple was not protected because Apple’s interest in
7 maintaining the confidentiality of employee records outweighs any interest plaintiff might have
8 had in sharing that information with third parties. Thus, Walker asserts, plaintiff’s conduct in
9 accessing, using, and disclosing the private information of her colleagues for her own
10 purposes cannot be considered a reasonable good faith protestation.

11 Walker argues further that plaintiff cannot show that he was responsible for any alleged
12 adverse action. He notes that plaintiff admitted in her deposition that she was not demoted as
13 a result of the investigation concerning her handling of confidential material, and that she did
14 not suffer any loss of pay grade, or loss of any money whatsoever – her title, office, and
15 compensation remained the same. Walker contends that the acts of promulgating new
16 department-wide personnel policies, disabling access to Apple during the period of paid
17 suspension, changing computer access to coincide with a new assignment, and conducting
18 an investigation that resulted in no discipline, had nothing to do with Walker and cannot be
19 said to have had a substantial and adverse material effect on plaintiff’s employment.

20 Finally, with regard to any possible claim that plaintiff might make that she was laid off
21 in retaliation for engaging in protected activity,⁵ Walker argues that the evidence shows he
22 was not involved in the decision to lay her off. Both Walker and Burmeister state in their
23 declarations that Burmeister made the decision to lay plaintiff off.

24 In response, plaintiff argues that she did engage in protected activity, and that she did
25

26 ⁵ The allegations under the “Retaliation” cause of action in the 5thAC do not mention the
27 lay-off. However, in the “General Allegations” section, plaintiff asserts that defendants “terminated
28 [plaintiff] after she filed a lawsuit against them.” As to that last allegation, plaintiff was laid off on
March 4, 2004, which, according to the docket, is the same day that Apple was served with the
summons and complaint.

1 suffer an adverse action. She contends that the November 12th e-mail specifically identified
2 non-African-American employees in the Compensation Group who were paid more than
3 plaintiff was, despite the fact that she had an MBA, six years of compensation experience,
4 and a “certification” in compensation.⁶ She claims that the e-mail “substantively functioned as
5 a complaint,” regardless of whether she herself actually characterized it as such. She
6 maintains that the e-mail was an attempt to bring potential discrimination to the attention of
7 someone in a position to remedy the situation, and that the question whether her belief that
8 she was discriminated against was in good faith and sincere presents a triable issue of fact
9 that precludes summary judgment.

10 Plaintiff also argues that she suffered an adverse action. She contends that after she
11 returned from the suspension, her workload was drastically reduced – her former projects
12 were reassigned and she was assigned to handle Latin America and Canada, along with
13 another employee (who was also given additional projects, while she herself was not). She
14 argues (without any support) that an employee whose workload has been drastically reduced
15 is vulnerable to a reduction in force, as her contributions are less visible and she seems less
16 valuable to the company. She also suggests that the lay-off was an adverse action.

17 Plaintiff contends in addition that there is a triable issue as to the causal link between
18 the sending of the e-mail and the alleged adverse action. She claims that improper motive
19 can be inferred from the fact that she sent the e-mail on November 12, 2003, and she was laid
20 off three and a half months later, in March 2004.

21 She does not respond to Walker’s argument that she can provide no evidence that
22 Walker himself subjected her to any adverse actions. In fact, she says nothing at all about
23 Walker, except in the most general terms – “it was [Walker’s] call to Parker that set in motion
24 the chain of events that are now at issue;” and “Walker admits that he instructed Sheri Parker,
25 employee relations director, to investigate the [e-mail] and to take appropriate action;” and
26

27 ⁶ As evidence of this, plaintiff cites to a “Patterson Declaration” that was never filed. In the
28 “amended opposition,” plaintiff cites to her deposition testimony, rather than to the nonexistent
Patterson Declaration. However, that testimony, even had the court not stricken the amended
opposition, does not support plaintiff’s factual assertions.

1 that she sent Walker the November 12th e-mail in order to bring the information in it to
2 Walker's attention.

3 The court finds that the motion must be GRANTED as to Walker. Plaintiff has not
4 established her prima facie case, as she has not provided evidence of any adverse action
5 taken by Walker, or even any evidence that he engaged in any of the conduct that she has
6 identified as retaliatory.

7 In addition, plaintiff has not shown that she engaged in any protected activity prior to the
8 filing of the EEOC/DFEH charges. Indeed, the evidence shows that she accessed the
9 confidential information for her own benefit – not as part of her legitimate work duties, or to
10 make a complaint of discrimination. Certainly the act of accessing confidential employee
11 information and sending the November 12th e-mail was not protected activity. Despite the
12 fact that the e-mail does state, for each of the various employees, his or her gender and race
13 (among other things), plaintiff cannot now claim it was intended as a complaint about
14 discriminatory treatment when she previously testified under oath that it was not. In addition,
15 she stated in the January 8, 2004, e-mail that “I made no claim or allegation of racial
16 discrimination in the [November 12th e-mail].”

17 b. Parker

18 Plaintiff claims that Parker retaliated against her for sending the November 12th
19 e-mail by changing company policies that affected her (by preventing her from attending
20 therapy sessions), by conducting an investigation into her disclosure of confidential employee
21 information (which included questioning other employees) and by suspending her (which
22 included blocking her network and employee access, removing her name from the door, and
23 possibly reducing her workload). She also suggests that the suspension pending the internal
24 investigation of her misuse of confidential information, and the March 2004 lay-off were
25 retaliatory.

26 As did Walker, Parker argues that plaintiff cannot establish a prima facie case
27 because she cannot show that she engaged in protected activity prior to the filing of the
28 EEOC/DFEH charges, and because she cannot show any adverse actions by Parker, making

1 the same argument as Walker, above. In addition, Parker contends that she had no role in
2 plaintiff's working conditions after the investigation, and that her sole involvement was limited
3 to overseeing the legitimate internal investigation of plaintiff's misuse of confidential employee
4 information.

5 Parker asserts that even if disabling of plaintiff's network and building access during
6 her suspension, asking questions of the Compensation Group employees during the
7 investigation, and promulgating new department policies regarding confidential information
8 (and presumably, employee hours) could be construed as adverse actions, plaintiff has
9 provided no evidence of retaliatory motive. Parker contends that the evidence shows that
10 these actions were taken as part of a good-faith investigation of plaintiff's apparent misuse of
11 confidential Apple personnel data, and that Parker's actions were not retaliatory.

12 Finally, Parker contends that she was not involved in plaintiff's lay-off. Both Parker and
13 Burmeister state in their declarations that the decision to lay off plaintiff was made by
14 Burmeister.

15 Plaintiff's opposition is as stated above, with regard to Walker. Specifically, plaintiff
16 claims that she did engage in protected activity, attempting to cast the November 12th
17 e-mail as a complaint of racial discrimination. She also asserts that she suffered adverse
18 actions, claiming that after she returned from the suspension, her workload was reduced. She
19 also claims that improper motive can be inferred from the fact that she sent the e-mail on
20 November 12, 2003, while she was laid off on March 4, 2005.

21 The court finds that the motion must be GRANTED as to Parker, for the reasons stated
22 above with regard to Walker. Plaintiff has not shown that she engaged in any protected
23 activity, or that Parker engaged in any adverse action. In addition, plaintiff provides no
24 evidence that the actions taken by Parker during the course of the investigation into plaintiff's
25 misuse of confidential employee information were not part of Apple's legitimate business
26 response to plaintiff's wrongful actions.

27 c. Burmeister

28 The only allegation of retaliation that plaintiff specifically makes against Burmeister in

1 the 5thAC is that he prevented her from attending therapy sessions. She also alleged, in the
2 amended DFEH charge filed January 28, 2004, that Burmeister's decision to lay her off was
3 retaliatory.

4 Burmeister argues that plaintiff cannot establish a prima facie case because she
5 cannot show she engaged in protected activity prior to the filing of the EEOC/DFEH charges.
6 This is the same argument made by Walker and Parker, above.

7 Burmeister also contends that plaintiff cannot establish a prima facie case because
8 she cannot show that she suffered an adverse action. He asserts that the sole allegation –
9 that he prevented her from attending therapy appointments – is not sufficient to constitute an
10 adverse action because it is not an act that has a substantial and material adverse effect on
11 the terms and conditions of the plaintiff's employment. Burmeister notes that plaintiff does not
12 claim that she suffered any loss of pay grade, or loss of any compensation whatsoever as a
13 result of her alleged inability to attend therapy appointments. Moreover, Burmeister notes that
14 plaintiff admitted in her deposition that she attended her therapy appointments throughout the
15 remainder of her employment at Apple, which constitutes a concession that this claim is false.
16 He argues that she cannot establish retaliatory motive for a non-existent cause of action.

17 Finally, Burmeister asserts that plaintiff provides no evidence of pretext or retaliatory
18 motive as to the lay-off. He argues that the undisputed evidence shows that budget cuts
19 required him to lay off three of the seven employees who reported to him, and that this
20 decision was based on legitimate reasons – Apple cut the total budget for Walker's
21 department, and Walker required three of his subordinates, including Burmeister, to reduce
22 their budgets by \$200,000 each. Burmeister concluded that plaintiff should be one of the
23 three employees laid off because she was one of the lowest performing. The laid-off
24 employees were not replaced, and a month later, when another employee left the group, no
25 replacement was hired.

26 Burmeister contends that plaintiff provides no evidence that the real reason for her lay-
27 off was retaliation for making a protected complaint of discrimination. He notes that when
28 plaintiff first raised the issue of retaliation in the January 8, 2004 e-mail to Walker, Apple

1 immediately hired independent investigator Rebecca Speer to investigate plaintiff's claims.
2 Speer found no evidence of wrongdoing by anyone at Apple. Burmeister claims that he had
3 no motive to retaliate against plaintiff for making any complaints, as he was not the subject of
4 any of plaintiff's complaints until he was named a defendant in this suit in January 2005, after
5 the case had already been pending for more than a year.

6 Plaintiff's opposition is as stated above, with regard to Walker and Parker.
7 Specifically, she claims that she did engage in protected activity, attempting to cast the
8 November 12th e-mail as a complaint of racial discrimination. She also asserts that she
9 suffered adverse actions, claiming that after she returned from the suspension, her workload
10 was reduced. She also claims that improper motive can be inferred from the fact that she sent
11 the e-mail on November 12, 2003, while she was laid off on March 4, 2005.

12 The court finds that the motion must be GRANTED as to Burmeister. For the reasons
13 stated above with regard to Walker and Parker, plaintiff cannot show that she engaged in
14 protected activity before she filed the DFEH charges. Moreover, she cannot show that she
15 suffered an adverse action, because she was suspended with pay, and suffered no loss of
16 compensation or benefits, and no demotion or job title change; and cannot show a causal
17 nexus because there was no protected activity prior to plaintiff's suspension, which occurred
18 before she filed any charge with DFEH.

19 Finally, plaintiff can show no evidence of retaliatory motive, as Burmeister was not
20 named by plaintiff in any administrative charge or complaint until November 2004, and was not
21 named as a defendant in this lawsuit until January 2005, a year after the original complaint
22 was filed. Thus, Burmeister would have had no reason to retaliate against plaintiff. Moreover,
23 Burmeister has provided evidence of a legitimate business reason for the suspension, and
24 plaintiff has provided no evidence showing that the articulated reason is pretextual.

25 4. Failure to prevent discrimination and failure to maintain environment free
26 from harassment

27 In the seventh cause of action, plaintiff alleges that Apple failed to take reasonable
28 steps to prevent discrimination from occurring. In the eighth cause of action, plaintiff alleges

1 that Apple failed to maintain an environment free from harassment.

2 California Government Code § 12940 provides that "[i]t shall be an unlawful
3 employment practice, unless based upon a bona fide occupational qualification . . . (k) For an
4 employer . . . to fail to take all reasonable steps necessary to prevent discrimination and
5 harassment from occurring." The California Supreme Court has stated that FEHA "makes it a
6 separate unlawful employment practice" for an employer to violate § 12940(k). State Dept. of
7 Health Servs., 31 Cal. 4th at 1040.

8 However, there can be no violation of 12940(k) absent a finding of actual
9 discrimination. See Tritchler v. County of Lake, 358 F.3d 1150, 1155 (9th Cir. 2004) (citing
10 Trujillo v. North County Transit Dist., 63 Cal. App. 4th 280, 283-84 (1998)). "[T]here's no logic
11 that says an employee who has not been discriminated against can sue an employer for not
12 preventing discrimination that didn't happen." Trujillo, 63 Cal. App. 4th at 289.

13 Apple argues that these two claims fail because plaintiff cannot state a claim for either
14 discrimination or harassment. Apple also asserts that plaintiff cannot show that Apple lacked
15 adequate policies to prevent discrimination, as Apple has provided evidence that it has an
16 extensive anti-discrimination program, which includes clear and frequently-disseminated
17 policies setting forth Apple's stand against discrimination and other types of unlawful conduct.
18 Apple also notes that although plaintiff did not believe that her November 12th e-mail was a
19 discrimination complaint, Apple immediately hired an outside investigator to look into her
20 claims and address any race or gender concerns. See Northrop Grumman Corp. v. Workers'
21 Comp. Appeals Bd., 103 Cal. App. 4th 1021, 1035 (2002) ("Prompt investigation of a
22 discrimination claim is a necessary step by which an employer meets its obligation [under
23 section 12940(k)].

24 Plaintiff does not oppose the motion as to these two causes of action in her original
25 opposition. In the untimely "amended opposition," plaintiff argues that while Apple did conduct
26 an investigation, that investigation "did not meet the appropriate standards." Relying on Silva
27 v. Lucky Stores, Inc., 65 Cal. App. 4th 256, 272 (1998), plaintiff argues that an investigation
28 should be performed by someone who is uninvolved in the incident and who is trained to

1 investigate, and should occur promptly; that important witnesses should provide their own
2 written statements; that the investigator should ask “open-ended” questions and attempt to
3 draw out facts, not opinions; that those interviewed should be encouraged to contact
4 investigator later if they think of anything else; that the complainant should be notified of the
5 investigation and should be afforded an opportunity to present her own version of events; and
6 that after interviews are completed, the complainant should have opportunity to comment on
7 result of investigation.

8 In her amended opposition, plaintiff claims that Rebecca Speer, the third-party
9 investigator hired by Apple, was not “uninvolved” in the investigation, because she was hired
10 by Apple. Plaintiff also complains that Speers’ first report wasn’t completed until two months
11 after the original complaint, that the employees who were interviewed did not provide their
12 own written statements, and that plaintiff was not kept informed of all the steps taken or the
13 results of the investigation. Plaintiff asserts that she was willing to speak with Speer, but only
14 with her attorney present, and that Apple refused to allow her to bring her attorney to the
15 interview because it was an “internal” Apple investigation. Plaintiff claims that the result was a
16 biased summary that did not tell all sides of the story. This, plaintiff asserts, Apple did not take
17 all reasonable steps to maintain a workplace free from discrimination.

18 The court finds that the motion must be GRANTED, as plaintiff has not established the
19 existence of any actual discrimination or harassment. The alleged defects in the investigation
20 cannot provide a basis for a claim of failure to prevent discrimination, as plaintiff admits she
21 sent the November 12th e-mail in an attempt to obtain a promotion or increased
22 compensation, not in an effort to complain about discrimination. Moreover, the California
23 Supreme Court has made clear that the requirement of a fair procedure does not compel
24 adherence to a single process, but may be satisfied by any of a number of procedures. See
25 Cotran v. Rollins Hudig Hall Int’l, Inc., 17 Cal. 4th 93, 108 (1998).

26 5. Defamation

27 In the ninth and tenth causes of action, plaintiff alleges claims of slander and libel
28 against Apple, Walker, and Parker, asserting that Walker and Parker made statements that

1 implied that plaintiff had accessed her co-workers' records, including their compensation
2 history, for her own benefit. Plaintiff alleges that these statements were false, and were
3 slanderous because they lowered plaintiff's reputation in the community.

4 To prevail on a claim of defamation, a plaintiff must prove an intentional publication of a
5 statement of fact that is false, unprivileged, and has a natural tendency to injure or which
6 causes special damage. Cal. Civ. Code §§ 45, 45a, 46. Truth is a complete defense to a
7 claim of defamation. Smith v. Maldonado, 72 Cal. App. 4th 637, 646 (1999).

8 In its motion, Apple argues that its potential liability is derived from the conduct of
9 Walker and Parker, and refers to those defendants' motions. Walker argues that plaintiff's
10 defamation claim fails to meet any of the required elements. He asserts that it is undisputed
11 that he was not involved in the investigation of plaintiff's handling of Apple's confidential
12 personnel information, and that he made no such statements. He contends that there is no
13 evidence that he communicated anything in writing on this subject to Speer or to anyone else.
14 He also asserts that it is undisputed that plaintiff did access her co-workers' private
15 compensation information for her own use, and argues that truth is a complete defense to a
16 claim of defamation.

17 Parker makes arguments similar to Walker's. She notes that it is undisputed that she
18 did not specifically discuss plaintiff in the course of discussing Apple's policies regarding
19 confidential information with the Compensation Group employees. She also contends that
20 there is no evidence that she made any false verbal statements about plaintiff, or that either
21 she or Walker made any written statements in which they "accused" plaintiff of accessing her
22 co-workers' information. Moreover, Parker notes, plaintiff did in fact access her co-workers'
23 private compensation information for her own purposes. Thus, she argues, as truth is a
24 complete defense, the claim has no merit.

25 Parker also asserts that plaintiff cannot establish that she suffered any special damage
26 as a proximate result of Parker's investigation. Parker argues that her contention that Parker
27 defamed her by asking about misuse of confidential information is not defamatory on its face,
28 and cannot therefore be defamation per se. Defamatory language not libelous on its face is

1 not actionable unless the plaintiff alleges and proves that she suffered special damages as a
2 result. See Cal. Civ. Code § 45a; see also 5 Witkin, Summary of Cal. Law, Torts, § 480.
3 Parker contends that plaintiff has offered no such evidence, and that the claim fails on this
4 ground as well.

5 In opposition, plaintiff asserts that she can show that Apple, through its agent Steve
6 Burmeister, made statements about her that were false, unprivileged, and had a tendency to
7 injure. She claims that during the security meeting with Parker and Hull that took place on
8 either November 12 or 13, 2003, Burmeister told Parker and Hull that plaintiff kept “guns” to
9 protect herself, and sat in her family’s living room during the L.A. riots, and that she had stated
10 that she would “go out in a blaze of glory” if she were ever terminated, and that she was
11 “looking for a big payout.”

12 Plaintiff claims that Burmeister later admitted he thought plaintiff was joking when she
13 said she would “go out in a blaze of glory,” and that he testified that her family laughed about
14 her sitting in her living room with a gun. Plaintiff asserts that Burmeister “clearly” did not
15 believe that plaintiff posed a threat to herself or to others, and yet he told Parker and Hull that
16 she did. Plaintiff also claims that Burmeister testified that the comment about the “big payout”
17 had been made in reference to plaintiff’s supervisor at Rand, and not about her employment at
18 Apple, and that it was not made in the context of indicating a desire to take advantage of an
19 employer.

20 Plaintiff asserts that the privilege that defendants now assert – the “common interest
21 privilege” – is not absolute. She argues that it can be overcome by evidence of actual malice
22 on the part of the speaker. She argues that Burmeister “clearly” did not believe the statements
23 he made about plaintiff were true, and that this creates a strong presumption of malice.

24 The court finds that the motion must be GRANTED as to Walker and Parker, as plaintiff
25 did not oppose the motion as to those two defendants. Moreover, it is undisputed that plaintiff
26 did access her co-workers’ personnel records, including their compensation history, for her
27 own use.

28 The motion must also be GRANTED as to Apple, as there is no evidence that the

1 statements attributed to Burmeister were false. The statements cannot form the basis of a
2 libel action because there is no evidence that Burmeister made any such statements in
3 writing. Further, the statements do not meet the standard for actionable slander because
4 plaintiff admitted in her deposition that she did tell Burmeister that she kept guns to protect
5 herself, and sat in her family's living room during the L.A. riots; that she would "go out in a
6 blaze of glory" if she were ever terminated; and that she was "looking for a big payout." Thus
7 the statements are true, and cannot form the basis of a claim of defamation.

8 Further, the "interested party privilege" applies to the statements made by Burmeister
9 to Parker and Hull during the security meeting because they were made in the course of
10 Parker's privileged investigation, between people who had a legitimate interest. See Cal.
11 Civil Code §§ 46, 47(c); Deaile v. Gen'l Tel., 40 Cal. App. 3d 841, 846 (1974). Plaintiff has
12 provided no evidence to overcome that privilege, and admits that Burmeister only repeated
13 statements that plaintiff had admittedly made. There is no evidence of malice. The evidence
14 shows that Burmeister was simply trying to communicate everything he knew about plaintiff
15 that might have a bearing on her reaction to a suspension.

16 6. Invasion of privacy

17 In the eleventh cause of action, plaintiff alleges a claim of invasion of privacy against
18 Apple, Walker, and Parker, asserting that Walker and Parker, acting as agents of Apple,
19 confiscated plaintiff's personal laptop computer and read and erased some of the contents.

20 The elements of a claim of invasion of privacy are 1) a prying or intrusion, 2) which is
21 offensive or objectionable to a reasonable person, 3) into a place or into affairs which are
22 private and entitled to be private. Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 231
23 (1998). To prove an actionable intrusion, the plaintiff must show that the defendant penetrated
24 a zone of physical privacy or sensory privacy surrounding, or obtained unwanted access to
25 data about, the plaintiff. Id. at 232. The plaintiff can prove the tort only if she can show she
26 had an objectively reasonable expectation of seclusion or solitude in the place, conversation,
27 or data source. Id.

28 The basis of plaintiff's claim is that Walker and Parker looked at the contents of her

1 laptop, which she used to perform Apple work, while investigating her misuse of confidential
2 information. Walker argues that the claim against him is baseless, as the evidence shows that
3 he did not even look at the laptop. Walker also asserts that Apple's written policies made it
4 clear that Apple had the right to inspect computers and that their employees had no
5 expectation of privacy. Thus, plaintiff could not have had any reasonable expectation that the
6 contents of her laptop, which contained Apple information and data, would remain confidential.
7 In addition, Walker points out, plaintiff consented to the brief retention and review of the
8 contents of her laptop.

9 Parker makes a similar argument, asserting that plaintiff's claim fails because she
10 cannot show that she had any objectively reasonable expectation of privacy in her laptop.
11 Parker also contends that there was no intrusion into plaintiff's private information. Parker
12 states in her declaration that she told plaintiff she would not look at plaintiff's personal files,
13 and she did not. She also kept the laptop secured. When plaintiff asked for the return of her
14 laptop the following day, she was permitted to retrieve it, after the confidential Apple files had
15 been deleted.

16 In opposition, plaintiff argues that Apple's policy about searching computers applies
17 only to Apple-owned computers, and that Apple had no right to search her personal computer.
18 Plaintiff also contends that the search was intrusive, because Apple searched all the files, not
19 just the Apple-related files. (She provides no evidence in support of this claim.) Plaintiff also
20 notes that while Apple contends it did not access any of plaintiff's personal information from
21 the laptop, Burmeister testified in his deposition that he took personal papers from plaintiff's
22 desk that included attorneys' names and phone numbers, notes written by plaintiff, and
23 plaintiff's EEOC complaint.⁷ Plaintiff claims that this act of removing the papers, and then
24

25 ⁷ Plaintiff misstates Burmeister's testimony. In the deposition excerpt attached as Exh.
26 A to the Declaration of Waukeen McCoy, Burmeister is recorded as testifying that he did not know
27 whether the documents he saw on plaintiff's desk were EEOC complaints, and that the document
28 he took was "a yellow piece of paper that just had attorneys' names and numbers and
addresses." He removed this document from plaintiff's desk because he was concerned about
where the confidential Apple personnel data "may have gone outside of the Company."
Burmeister stated in his declaration that when he entered plaintiff's work area on November 12th
to retrieve business documents, he discovered that plaintiff had left sensitive employee data

1 copying them (which he allegedly did at Parker's request) constituted invasion of privacy.

2 The court finds that the motion must be GRANTED as to Walker, as there is no
 3 evidence that he reviewed any of the information on plaintiff's laptop. The motion must also be
 4 GRANTED as to Parker, as plaintiff consented to hand over her laptop to Parker, and Parker
 5 returned it when plaintiff requested it the next day. In addition, Parker states in her declaration
 6 that she did not review plaintiff's private information, and plaintiff provides no evidence to the
 7 contrary.⁸

8 As for the new claim – that Burmeister took personal documents from plaintiff's office,
 9 and that Parker ordered them copied – the motion must be GRANTED as to Parker and as to
 10 Apple.⁹ Under the circumstances (the investigation into plaintiff's use of confidential Apple
 11 personnel information), Burmeister was justified in removing any documents containing
 12 employee data from the table in plaintiff's office, and Parker was justified in asking Burmeister
 13 to make copies. Moreover, given Apple's written policy – that Apple may review and monitor
 14 the contents of employees' "computer(s), file cabinets, desks, and offices (even if locked)" –
 15 plaintiff could not have had a reasonable expectation of privacy in the contents of writings she
 16 left on a table in her office.

17 7. Wrongful termination in violation of public policy

18 In the twelfth cause of action, plaintiff alleges wrongful termination in violation of public
 19 policy against Apple. To establish a claim of wrongful discharge in violation of public policy
 20 under California law, plaintiff must show (1) that she was a member of a protected class,
 21

22 _____
 23 unsecured on a table in her office next to what appeared to be a list of non-Apple personnel,
 24 which further heightened his concern that plaintiff might have disclosed confidential Apple
 25 information to third parties.

26 ⁸ According to defendants, Apple information technology analyst Ty Weiss ("Weiss") took
 27 an image of plaintiff's laptop and saved a copy on Parker's desktop. There is no evidence that
 28 anyone at Apple other than Parker and Weiss viewed any information on plaintiff's laptop.
 Plaintiff called the following day and requested the return of her laptop, and it was returned to her.
 Weiss explained that he was deleting the confidential Apple files so she could have the laptop
 back. Plaintiff stated in her deposition that she was unaware of any facts suggesting that her
 personal information was accessed.

⁹ The claim of invasion of privacy is not asserted against Burmeister.

(2) that she was qualified for the position she sought or was performing competently in the position she held, (3) that she was terminated from her employment, and (4) that some other circumstance suggests discriminatory motive – i.e., that there was a nexus between the termination and the plaintiff's status or protected activity, 5) and damages. See Guz v. Bechtel Nat'l, Inc., 24 Cal 4th 317, 355 (2000).

In order to support a wrongful discharge claim under California law, a public policy must be (1) delineated in either constitutional or statutory provisions; (2) "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) "substantial" and "fundamental." Stevenson v. Superior Court, 16 Cal. 4th 880, 901 (1997).

According to the 5thAC, the policy is derived from FEHA; California Constitution, Article 1, § 8;¹⁰ and Title VII. A discharge in violation of FEHA may give rise to a common law claim for wrongful discharge. City of Moorpark v. Superior Court, 18 Cal. 4th 1143, 1159-60 (1998). Federal law, and in particular, Title VII, may supply an alternative public policy basis for a wrongful termination claim. Phillips v. St. Mary Regional Med. Ctr., 96 Cal. App. 4th 218, 234 (2002). The constitutional prohibition against disqualifying a person from entering or pursuing a business, profession, vocation, or employment because of race, also supports actions alleging wrongful race-based terminations of employment relationships in violation of public policy. Sistare-Meyer v. Young Men's Christian Assn., 58 Cal. App. 4th 10, 14-15 (1997).

Apple argues that summary judgment should be granted on this cause of action because plaintiff cannot establish a prima facie case that her termination was in violation of public policy. To establish a prima facie case regarding her lay-off, plaintiff must show that she belongs to a protected class, that she was performing in a satisfactory manner, was

¹⁰ "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." Cal. Const., Art. I, § 8.

1 discharged, and was replaced by a person with inferior qualifications who was not in the
2 protected class. Guz, 24 Cal. 4th at 354-55.

3 Apple contends that plaintiff cannot show that she was replaced by another person,
4 because the evidence shows that her duties were assumed by the employees remaining in
5 the Compensation Department, and no one was hired to fill her position. Thus, Apple argues,
6 plaintiff cannot establish a prima facie case.

7 Apple also contends that it has articulated a legitimate, nondiscriminatory reason for
8 plaintiff's lay-off. The budgetary shortfall in Apple's HR Department required that some
9 employees be terminated. A reduction-in-force is a legitimate non-discriminatory reason for
10 termination. Winarto v. Toshiba America, 274 F.3d 1276, 1295 (9th Cir. 2001); Martin v.
11 Lockheed Missiles, 29 Cal. App. 4th 1718, 1732 (1994).

12 Thus, the burden shifts to plaintiff to show that Apple's articulated reason was
13 pretextual. Plaintiff must provide either direct evidence of discrimination, or circumstantial
14 evidence that Apple is biased or that Apple's explanation is otherwise unworthy of credence.
15 Coghlan, 413 F.3d at 1094-95; see also Cucuzza v. City of Santa Clara, 104 Cal. App. 4th
16 1031, 1038 (2002). Apple argues that plaintiff cannot show that Apple's stated reason for the
17 lay-off – the budget cuts that required Burmeister to lay off 3 of the 7 employees who reported
18 to him – was pretextual.

19 In opposition, plaintiff contends that she meets the elements of the prima facie case.
20 She was a member of a protected class. She was rated "solid contributor" in her performance
21 evaluation, and asserts that she meets the burden of showing that she was performing
22 satisfactorily. There is no dispute that she was discharged. With regard to the fourth element,
23 plaintiff claims that the number of employees reporting to Burmeister actually increased within
24 a year after plaintiff was terminated, when Ken Lara joined plaintiff's former group.

25 She argues that Apple's articulated reason for the lay-off was pretextual, citing to the
26 same facts she cited in the claims of racial discrimination. She asserts that the fact that
27 Burmeister made racially derogatory comments and the fact that there has been only one
28 African-American consultant in the Compensation Group shows that Apple's explanation is

1 unworthy of credence.

2 The court finds that the motion must be GRANTED. Plaintiff has not established a
3 prima facie case of wrongful termination, because she has not shown that she was replaced.
4 The fact that someone was hired into the Compensation Group a year after plaintiff was laid
5 off is irrelevant, as a year is too long to show replacement. The evidence shows that
6 Burmeister laid off three employees (including plaintiff) in March 2003, and lost another
7 employee in April 2004 when Higuchi left, and was then given responsibility for a small
8 reporting group in addition to his three remaining Compensation Group employees. Ken Lara
9 replaced one of the employees in this small additional group.

10 In addition, plaintiff provides no evidence showing pretext or discriminatory intent. She
11 provides no competent evidence that she should have been retained instead of one of the four
12 employees who were retained after the reduction in force. Although "solid contributor" was not
13 an unfavorable rating, it is undisputed that Burmeister had received complaints about
14 plaintiff's performance and attitude from two HR representatives (both African-American
15 women). Burmeister's comments are not sufficient to show pretext, for the reasons stated
16 above in the section on racial discrimination. The fact that there was only one African-
17 American employee in the seven-person Compensation Group is statistically immaterial.

18 8. Sexual orientation discrimination

19 In the thirteenth cause of action, plaintiff alleges sexual orientation discrimination
20 (FEHA) against Apple. Specifically, she alleges that Apple "engaged in a continuing pattern
21 and practice of unlawful sexual orientation discrimination . . . in connection with plaintiff's work
22 assignments, promotion and the terms and conditions of plaintiff's employment, by failing to
23 promote and raise the rate of compensation of plaintiff when plaintiff applied for and was
24 otherwise qualified for a job position and by basing the decision to discipline plaintiff on her
25 sexual orientation."

26 Apple asserts, however, that plaintiff failed to exhaust her administrative remedies with
27 regard to the claim of failure to promote or the claim that she was unlawfully suspended. Her
28 amended DFEH charge, where she for the first time asserted claims of discrimination based

1 on sexual orientation and genetic characteristic, identifies the adverse action only as “laid off.”
2 To exhaust her administrative remedies as to a particular act made unlawful by FEHA, the
3 claimant must specify that act in the administrative complaint, even if the complaint does
4 specify other cognizable wrongful acts. Martin v. Lockheed Missiles and Space Co., Inc., 29
5 Cal. App. 4th 1718, 1724 (1994). Failure to exhaust is a jurisdictional defect, see id., and
6 Apple argues that summary judgment should be granted for this reason.

7 Apple argues further that even if plaintiff had pled that her lay-off was due to her sexual
8 orientation, she cannot show that Apple’s articulated reason for the lay-off was pretextual.
9 Apple asserts that there is no evidence that plaintiff’s sexual orientation played any role in
10 Burmeister’s decision to lay her off. Moreover, he had twice hired her at other companies,
11 and had been influential in getting her hired at Apple, and all that time he had been aware of
12 the fact that she was a lesbian. (Both Burmeister and plaintiff’s brother are also gay.) Apple
13 contends that the fact that Burmeister made the decision to lay her off establishes a strong
14 inference of non-discrimination as a matter of law.

15 In opposition, plaintiff claims to be “at a loss as to why defendant has alleged that she
16 failed to exhaust her administrative remedies,” because she filed a DFEH charge in
17 November 2004 asserting sexual orientation discrimination. Plaintiff contends that she can
18 prove the elements of her claim, and that the failure to promote her, the suspension, and the
19 termination were motivated by sexual orientation discrimination.

20 She contends that after she complained of race discrimination (referring to the
21 November 12th e-mail), Parker and Burmeister held a security meeting with Hull, and that
22 during that meeting, Burmeister indicated that plaintiff was a lesbian. He testified in his
23 deposition that he did so as part of an explanation as to why she might be unhappy with her
24 life. Plaintiff claims that there was no legitimate business reason for Burmeister to disclose
25 this information, and that Apple’s suggestion that was related to the security concerns is
26 without merit, as the fact that she was a lesbian is irrelevant to Apple’s concern over
27 workplace security. Plaintiff claims (without support) that Burmeister was angry that plaintiff
28 had made allegations that might subject him to scrutiny, and “attempted to capitalize on the

1 unfortunate reality of homophobia in order to generate whatever ill-will that he could on the part
2 of Parker and Hull.” She claims that the fact that she was suspended for one month shows that
3 Burmeister was effective.

4 Plaintiff asserts that Burmeister’s animus toward lesbians is shown by the fact that he
5 made many comments disparaging of lesbians, such as asking, “Why are lesbians so poor?”
6 or “Why are lesbians so hostile?” or “Why are lesbians so violent, what is wrong with you
7 people?” She claims that on one occasion, Burmeister told her about a situation with a
8 lesbian he encountered in San Francisco, and that on another occasion, he asked, “Why are
9 black people, or black women, specifically black lesbians, why are they so fat?” She also
10 asserts that he said that “you people” must “surely love canes, because you need them to
11 support your weight.” She contends that he also asked why lesbians had such an affinity
12 towards trucks and camping. She claims to have been offended and insulted by these
13 comments.

14 Finally, plaintiff argues that the “same actor” inference is simply a presumption that can
15 be rebutted, and that it does not apply in this case because it was Kaufman, not
16 Burmeister, who made the decision to hire her.

17 The court finds that the motion must be GRANTED. Plaintiff did not exhaust her
18 administrative remedies with regard to the claim of failure to promote or the claim that she
19 was unlawfully suspended. The administrative charge was premised only on her termination,
20 and she never alleged in the 5thAC that she was terminated based on her sexual orientation.
21 Nor did she state in her deposition that her sexual orientation was a factor in her termination,
22 only in her suspension.

23 Moreover, Apple has provided a legitimate, non-discriminatory reason for the decision
24 to lay her off, and plaintiff provides no substantial evidence that this explanation is pretextual,
25 and no evidence that her sexual orientation played any role in any decision made with regard
26 to her. The claim that Burmeister attempted to “capitalize on the unfortunate reality of
27 homophobia” is completely speculative and without support. There is no evidence that, as of
28 the time of the security meeting, plaintiff had made any allegations that might subject

1 Burmeister to scrutiny. Nor does plaintiff provide any evidence that Parker or Hull are
2 homophobic, or that Burmeister's alleged attempt to turn Parker and Hull against plaintiff was
3 successful. Indeed, the evidence shows that plaintiff was suspended with full pay while the
4 investigation as on-going, and that she was allowed to return to work with no discipline after
5 the investigation.

6 The comments about lesbians were casual, stray comments made outside the
7 employment environment over a period of years by a person with whom plaintiff was
8 supposedly friends. Plaintiff admitted that the comments about lesbians camping, going to
9 dance clubs or political rallies, using canes, or being poor or hostile were sprinkled through
10 the many years of her friendship with Burmeister – amounting, according to plaintiff's
11 deposition testimony, to maybe two or three comments a year – during which time she and
12 Burmeister frequently discussed their social lives, their families, their sexual orientation, and
13 during which time Burmeister twice personally hired plaintiff and once recommended her for a
14 position (at Apple) and advocated for a relatively high salary for her.

15 Further, the fact that Burmeister made the decision to lay her off establishes a strong
16 inference of non-discrimination as a matter of law. Where the same person both hires and
17 fires within a relatively short period of time, a strong inference arises that there was no
18 discriminatory motive. Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996);
19 Horn v. Cushman & Wakefield Western, Inc., 72 Cal. App. 4th 798, 809 (1999). Although, in
20 this case, plaintiff was hired to work at Apple by Kaufman, not by Burmeister, it is undisputed
21 that Burmeister recommended her for the job at Apple, and that he had previously hired
22 plaintiff to work under him for two other employers.

23 The Ninth Circuit recently held, in Coghlan, that the burden of presenting “specific and
24 substantial” evidence of intentional discrimination is “especially steep” in cases where the
25 “same actor” inference applies. Coghlan, 413 F.3d at 1095. The “same actor” inference is
26 “neither a mandatory presumption . . . nor a mere possible conclusion for the jury to draw.” Id.
27 at 1098. Rather, it is a “strong inference,” and a plaintiff seeking to defeat this inference is
28 required to make out a strong case of bias. Id. Here, plaintiff provides no direct evidence and

1 only weak and insubstantial circumstantial evidence.

2 9. Genetic characteristic discrimination

3 In the fourteenth cause of action, plaintiff alleges genetic characteristic discrimination
4 (FEHA) against Apple. Specifically, she alleges that Apple "engaged in a continuing pattern
5 and practice of unlawful genetic characteristic discrimination . . . in connection with plaintiff's
6 work assignments, promotion and the terms and conditions of plaintiff's employment, by failing
7 to promote and raise the rate of compensation of plaintiff when plaintiff applied for and was
8 otherwise qualified for a job position and by basing the decision to discipline plaintiff on her
9 sexual orientation."

10 Apple argues that plaintiff failed to exhaust her administrative remedies with regard to
11 the claim of failure to promote or the claim that she was unlawfully suspended. Her amended
12 DFEH charge, where she for the first time asserted claims of discrimination based on sexual
13 orientation and genetic characteristic, identifies the adverse action only as "laid off." Failure
14 to exhaust is a jurisdictional defect, see Martin, 29 Cal. App. 4th at 1724, and Apple argues
15 that summary judgment should be granted for this reason.

16 Apple also contends that plaintiff cannot prevail on this claim because she does not
17 meet the statutory definition of "genetic characteristic." FEHA prohibits discrimination against
18 individuals who have a "physical disability, mental disability, or medical condition." Cal. Gov't
19 Code § 12920. "Medical condition" means either a) cancer or related health impairments, or
20 b) "genetic characteristics," which is defined as

21 [a]ny scientifically or medically identifiable gene or chromosome, or combination
22 or alteration thereof, that is known to be a cause of a disease or disorder in a
23 person or his or her offspring, or that is determined to be associated with a
statistically increased risk of development of a disease or disorder, and that is
presently not associated with any symptoms of any disease or disorder

24 or

25 [i]nherited characteristics that may derive from the individual or family member,
26 that are known to be a cause of a disease or disorder in a person or his or her
27 offspring, or that are determined to be associated with a statistically increased
risk of development of a disease or disorder, and that are presently not
associated with any symptoms of any disease or disorder.

28 Cal. Gov't Code § 12926(h)(2).

1 Apple argues that under this definition, plaintiff can prevail on this claim only if she
2 shows that her obesity results from a physiological condition affecting one or more bodily
3 symptoms. In Cassista v. Community Foods, Inc., 5 Cal. 4th 1050, 1065 (1993), the California
4 Supreme Court held that an individual who asserts a FEHA claim on the basis of his or her
5 weight must adduce evidence of a physiological, systemic basis for the condition. Apple
6 contends that plaintiff, who testified in her deposition that she has never undergone any
7 genetic or medical testing, cannot establish that her weight was caused by a physiological
8 condition affecting one or more bodily symptoms, or that she has any other “scientifically or
9 medically identifiable gene or chromosomes.”

10 Moreover, under the FEHA definition, the genetic characteristic must not be “presently
11 associated with any symptoms of any disease or disorder.” Apple notes that plaintiff claimed
12 in her deposition that she had suffered multiple disorders because of her weight while she
13 was employed at Apple – high blood pressure, high cholesterol, gallbladder surgery as a
14 result of weight loss, removal of additional gallstone related to the gallbladder surgery. She
15 even claimed that doctors were advising her that she would “die” if she didn’t lose weight.

16 Finally, Apple argues that even if plaintiff had pled that her lay-off was based on her
17 weight, such a claim would fail because she has no evidence that her weight contributed to her
18 lay-off. She admitted that she was obese during the entire period that she knew Burmeister –
19 during which time he hired her into two jobs, and recommended her for a job at Apple and was
20 influential in getting her hired. Thus, Apple asserts, there is a strong inference of non-
21 discrimination as a matter of law (the “same actor” inference).

22 In opposition, plaintiff claims she is “at a loss as to why defendants have alleged that
23 she failed to exhaust her administrative remedies,” as she filed a DFEH charge alleging
24 discrimination on the basis of genetic characteristics in December 2004 (actually November
25 2004).

26 Plaintiff also claims that she has established the elements of her claim. With regard to
27 Apple’s argument that her weight does not meet the definition of a “genetic characteristic,”
28 she asserts that the opinion in Cassista is distinguishable because the plaintiff there had sued

1 for disability discrimination, not genetic characteristic discrimination. She also claims that the
2 fact that she has not undergone genetic testing does not mean that there is not a genetic basis
3 for her obesity. She claims to have offered evidence that her obesity is caused by genetics –
4 pointing to her deposition testimony that several family members are clinically obese, and that
5 African-American women suffer disproportionately from obesity-related disease such as
6 stroke and heart disease. She claims that genetic testing would be expensive, and there
7 would be no benefit to her of incurring this expense, as there is no gene therapy for obesity.

8 She asserts that Burmeister has shown evidence of animus toward obese people –
9 specifically, that he told her on a number of occasions that her chances of promotion at Apple
10 would be better if she lost weight. She adds that despite Apple’s evidence that Walker and
11 plaintiff’s brother Byron Patterson were obese at one time, this does not mean that no one at
12 Apple discriminated against plaintiff because of her weight. She speculates (without any
13 support) that it is “one of life’s hard realities” that physical imperfections are less tolerated in
14 women than in men – suggesting that people at Apple would view Walker’s obesity as
15 tolerable, while at the same time discriminating against her because of her weight.

16 Finally, she argues that the “same actor” inference does not apply because it is a
17 presumption that can be rebutted. She notes that it was Kaufman who hired her, not
18 Burmeister. She claims that the fact that Burmeister knew of plaintiff’s obesity before she was
19 hired is not dispositive, as she asserts that her weight fluctuated during the years that she and
20 Burmeister were acquainted. She also claims that she had gastric-bypass surgery while she
21 was at Apple, and in fact weighed considerably less when she was terminated than when she
22 was hired, but that Burmeister knew she was having problems with the post-surgery diet, and
23 therefore “had no reason to believe” she would keep her weight down.

24 The court finds that the motion must be GRANTED. Plaintiff did not exhaust her
25 administrative remedies with regard to the claim of failure to promote or the claim that she
26 was unlawfully suspended. The administrative charge was premised only on her termination,
27 and she never alleged in the 5thAC that she was terminated based on a genetic
28 characteristic.

Moreover, her obesity does not meet the statutory definition of “genetic characteristic” – specifically, that the genetic characteristic not presently be associated with the symptoms of any disease or disorder. Even if plaintiff had provided proof that her excess weight was caused by some “scientifically or medically identifiable gene or chromosome,” she has admitted that her obesity was “associated with . . . symptoms of . . . disease or disorder” – specifically, that she suffered from high blood pressure, and high cholesterol, and that she was required to undergo gallbladder surgery as a result of weight loss, and removal of additional gallstone related to the gallbladder surgery.

Finally, the “same actor” inference requires that plaintiff provide specific and substantial evidence of pretext. The only evidence she provides are the statements allegedly made by Burmeister, to the effect that she would go farther at Apple if she lost weight. These comments are little more than stray remarks about other decisionmakers. Plaintiff provides no evidence that Burmeister ever told her plaintiff that his own decisions about her would be different if she were to lose weight. Plaintiff even admitted at her deposition that Burmeister indicated to her that her weight “wasn’t a factor in his mind, but it was a factor in others’ minds.” Standing alone, Burmeister’s comments are not sufficient to overcome the strong inference of non-discrimination created by the fact that Burmeister twice hired plaintiff and gave her a strong recommendation when she applied at Apple.

10. Punitive damages

Defendants argue that the summary judgment should be granted as to the prayer for punitive damages because plaintiff has not provided evidence of oppression, fraud, or malice. The court finds that the motion must be GRANTED, as the court has found that summary judgment appropriate as to all the causes of action in the 5thAC.

MOTION FOR SANCTIONS

A. Legal Standard

Rule 11 sanctions may appropriately be imposed on the signer of a paper “if either (a) the paper is filed for an improper purpose, or (b) the paper is ‘frivolous.’” Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir.1991) (en banc). A paper is

1 "frivolous" if it is "both baseless and made without a reasonable and competent inquiry." Id.;
2 Buster v. Greisen, 104 F.3d 1186, 1190 (9th Cir. 1997). An assertion is baseless where it
3 completely lacks a factual foundation, see Montrose Chem. Corp. of Calif. v. American
4 Motorists Ins. Co., 117 F.3d 1128, 1133 (9th Cir.1997), and a competent attorney could not
5 form a reasonable belief that it is warranted by existing law or a good faith argument for
6 extension, modification or reversal of existing law. See Fed. R. Civ. P. 11(b)(2); Golden
7 Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir.1986). Both the
8 "baseless" and "reasonable inquiry" determinations are governed by an objective standard of
9 "reasonableness under the circumstances." In re Keegan Mgmt Co., Sec. Litig., 78 F.3d 431,
10 434 (9th Cir.1995) (confirming approach in Townsend).

11 B. Motion for Sanctions

12 Apple and Walker move for sanctions under Federal Rule of Civil Procedure 11,
13 arguing that the original complaint as well as all the amended complaints were presented to
14 the court for an improper purpose, that the claims and legal contentions related to Walker in
15 those complaints are unwarranted by existing law, and that the allegations against Walker lack
16 factual support. They seek fees and costs incurred in the defense of the claims asserted
17 against Walker – which they estimate at \$24,000 to date. Plaintiff opposes the motion, and
18 also moves for sanctions pursuant to Federal Rule of Civil Procedure 37, requesting \$3,120.

19 Plaintiff alleged five claims against Walker – racial harassment (FEHA), retaliation
20 (FEHA), slander, libel, and invasion of privacy. Defendants assert that it was clear from
21 plaintiff's deposition that all these claims lacked any factual foundation from the time they were
22 asserted, but that plaintiff nonetheless included the allegations against Walker each time she
23 amended her complaint.

24 On December 9, 2004, after completing the first three days of plaintiff's deposition,
25 defense counsel sent Patterson and her counsel a letter addressing the lack of factual support
26 and legal viability of her claims against Walker. Defense counsel urged plaintiff's counsel to
27 dismiss the claims against Walker. In response, plaintiff filed a third amended complaint in
28 which she added a claim of retaliation against Walker personally. After defense counsel

1 wrote plaintiff's counsel another letter pointing out the lack of a factual basis for those claims in
2 the third amended complaint, plaintiff filed a fourth amended complaint asserting an additional
3 claim of retaliation against Walker.

4 Plaintiff took the depositions of Burmeister in October 2004, Parker in February 2005,
5 and Walker in March 2005. All three deponents, and especially Walker, confirmed Walker's
6 lack of involvement in the investigation into plaintiff's access and misuse of confidential Apple
7 personnel records. Following that deposition, on April 19, 2005, defendants' counsel sent
8 another letter urging plaintiff to drop the claims against Walker. Plaintiff's response was to file
9 a fifth amended complaint, alleging the same claims against Walker, and containing the same
10 factual allegations that the depositions had shown to be untrue (e.g., that Walker disabled
11 plaintiff's network access, "interrogated" her co-workers about her, and prevented plaintiff
12 from attending her therapy appointment). According to defendants, plaintiff's counsel never
13 responded to the April 19, 2005, letter.

14 Defendants argue that the undisputed evidence shows that plaintiff had only two or
15 three personal contacts or interactions with Walker, and that those, according to plaintiff's
16 deposition testimony, were brief and pleasant. Indeed, in one of them, Walker complimented
17 her on a report she had prepared. Walker had no involvement in hiring plaintiff, in supervising
18 her, or in the investigation into plaintiff's inappropriate misuse of confidential Apple
19 information. When he received plaintiff's November 12th e-mail stating her view that she
20 should receive a raise and a promotion, Walker asked Sheri Parker, Apple's Director of
21 Employee Relations, to investigate the situation and take appropriate action. The evidence
22 shows further that Walker did not make the decision to suspend plaintiff – Parker did that –
23 and that he did not make the decision to lay her off during the March 2004 reduction in force –
24 that was Burmeister's job.

25 Defendants argue that all five of the claims asserted against Walker are baseless.
26 First, they assert that the racial harassment claim is without merit because, as disclosed in
27 discovery, Walker was not responsible for any of the acts that plaintiff claimed constituted
28 harassment (creating a new policy for the Compensation Department regarding work hours,

1 interrogating plaintiff's co-workers about her, preventing plaintiff from attending therapy
2 appointments, disabling plaintiff's network and building access during her suspension, and
3 removing plaintiff's name from her door). Moreover, defendants contend that the alleged
4 harassing conduct all constituted "personnel management activity," which was related to a
5 legitimate investigation of plaintiff's misuse of confidential employee information, and which
6 cannot constitute harassment as a matter of law. In addition, they assert that plaintiff has no
7 evidence of racial animus on the part of Walker, and that the conduct was not "severe" or
8 "pervasive."

9 Second, defendants argue that the retaliation claim lacks a factual or a legal
10 foundation. The retaliation claim alleges all the same conduct as the harassment claim, and
11 defendants assert that discovery showed it was plainly without merit for the same reasons.
12 Defendants also contend that this claim is without merit because plaintiff cannot show she was
13 subjected to an adverse action.

14 Third, defendants argue that the two defamation claims lack both a factual and a legal
15 basis. In the cause of action for defamation, plaintiff alleges that Walker made statements
16 implying that she accessed her co-workers' records, and accused plaintiff of accessing her
17 co-workers' compensation information in a writing transmitted to the independent investigator
18 and Burmeister. Defendants assert that the depositions showed that Walker was not involved
19 in the investigation of plaintiff's violation of Apple's confidential information policies, and that
20 there was never any evidence that Walker communicated anything about plaintiff in writing to
21 Speer or to anyone else. Finally, defendants contend that these claims lack a factual and
22 legal basis, because plaintiff admitted that she did access her co-workers' private
23 compensation information for her own use, and the alleged defamatory statements were
24 therefore non-actionable because they were true.

25 Fourth, defendants contend that the privacy claim against Walker lacks a factual and
26 legal basis. The basis of the claim against Walker was the assertion that he looked at the
27 contents of her personal laptop – which she used to perform Apple work – while investigating
28 her misuse of confidential information. Defendants note that plaintiff testified in her deposition

1 that she was unaware that anyone other than Parker and Weiss (the technician) had reviewed
2 any material on her laptop, let alone personal information. Moreover, defendants assert that
3 Walker's deposition confirmed that he was not involved in the investigation, and that he had
4 asked Parker to handle it. Defendants argue in addition that there is no legal basis for the
5 privacy claim because Apple's written policies make it clear that Apple has the right to inspect
6 computers and that the employees have no expectation of privacy in the contents of their
7 computers.

8 In opposition, plaintiff argues that the motion is frivolous, claiming that she did not do
9 anything prohibited by Rule 11, and asserting that she has provided sufficient evidence to
10 support every cause of action alleged in this lawsuit. She contends that after Walker received
11 her complaint that she was being treated differently in the workplace than her non-Black
12 counterparts (referring to the November 12th e-mail), she was suspended, forced to turn over
13 her personal computer, harassed, kept idle with no work when she returned from the
14 suspension, and then wrongfully terminated.

15 Plaintiff claims that she had a reasonable basis for believing that Walker was involved
16 in the acts at issue in the lawsuit. For example, she asserts that Burmeister told her that while
17 he had made the recommendations regarding the merit increases, Walker had done the
18 evaluations and determined the merit increases himself. She claims she was "in no position
19 to dismiss Dan Walker with nothing more than the self-serving statements of the defendant
20 upon which to base her decision." She also asserts that it is for the trier of fact to weigh the
21 credibility of the witnesses, where their statements are in conflict with each other.

22 Plaintiff maintains that each of her claims against Walker are warranted by existing law.
23 First, she contends that the harassment claim is valid because Burmeister testified that he
24 gave Burmeister free rein, and the evidence shows that Burmeister made a number of
25 derogatory comments about African-Americans.

26 Second, she asserts that the retaliation claim against Walker has merit because she
27 has established all the elements of the claim. She submits that even though she testified that
28 the November 12th e-mail was not a complaint of racial discrimination, the fact was that it

1 specifically identified a number of non-African-American employees in the Compensation
2 Group who were paid less than plaintiff was. Thus, plaintiff asserts, she engaged in protected
3 activity. She also claims that she suffered adverse action, in that her work load was reduced
4 after she returned from the suspension, and because she was terminated. She asserts further
5 that there is a triable issue as to pretext, claiming that the “timing” of the adverse actions is
6 suspect. Specifically, she notes that immediately after she wrote an e-mail to Walker
7 requesting that he end the discriminatory conduct of Apple with regard to salaries, she was
8 suspended for one month, her laptop was confiscated, and then she was terminated.

9 Third, plaintiff claims the defamation claims have merit, because she can show that
10 Burmeister made statements about her that were false and non-privileged, and which he did
11 not believe were true.

12 Fourth, she contends that the privacy claim is valid. She argues that Apple’s policy
13 regarding inspection of computers applies to Apple computers, not to personal computers.
14 She also contends that Burmeister’s act of removing personal papers from the table in her
15 office, and then copying them at Parker’s request, satisfies the elements of invasion of
16 privacy.

17 Finally, she argues that she is entitled to sanctions under Rule 37 for her counsel’s time
18 in “responding to this baseless motion.”

19 The court finds that the motion must be GRANTED. Plaintiff has provided no facts to
20 support the racial harassment claim against Walker, failed to state any factual or legal basis
21 for the retaliation claim or the defamation claim against Walker, and stated no facts showing
22 that her invasion of privacy claim was well-grounded in fact or law. On more than one
23 occasion, defendants put plaintiff on notice that her claims against Walker were frivolous, but
24 plaintiff persisted.

25 Plaintiff has misstated the standard for Rule 11. Defendants do not base the motion
26 solely on Walker’s testimony, but on the facts that, for example, plaintiff herself could not testify
27 to any harassment by Walker, that none of the statements in the defamation claim had
28 anything to do with Walker, and that plaintiff testified that she had no knowledge that Walker or

1 anyone other than Parker and Weiss looked at the contents of her laptop. It is not necessary
2 that defendants establish bad faith on plaintiff's part, as Rule 11 sanctions do not depend on a
3 finding of bad faith or malicious motive. Rather, the test is an objective one – "if the paper
4 filed is . . . frivolous, legally unreasonable or without factual foundation even though . . . not filed
5 in subjective bad faith." Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986).
6 Rule 11 sanctions are plainly warranted where claims against any defendant are frivolous,
7 even though a plaintiff may have stated a non-frivolous claim against another. Townsend, 914
8 F.2d at 1141-44.

9 Rule 11 also applies to plaintiff's continued advocacy of the claims against Walker by
10 filing multiple amended complaints alleging retaliation without any basis in law or fact, refusing
11 to withdraw her claims against Walker, responding to interrogatories stating that Walker had
12 acted deliberately and without regard to the high probability of economic harm to plaintiff, and
13 opposing the motion for sanctions and attempting to mislead the court by misrepresenting
14 Walker's deposition testimony.

15 The court awards defendants \$5,000 in sanctions against plaintiff and her counsel, the
16 Law Offices of Waukeen Q. McCoy. The "central purpose of Rule 11 is to deter baseless
17 filings in District Court and thus . . . streamline the administration and procedure of the federal
18 courts Although the rule must be read in light of concerns that it will spawn satellite
19 litigation and chill vigorous advocacy . . . any interpretation must give effect to the Rule's
20 central goal of deterrence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). The
21 court finds that an award of sanctions in the amount of \$5,000 is sufficient to serve the goal of
22 deterrence, as articulated by the Supreme Court.

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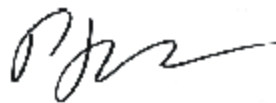
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1 Plaintiff's request for Rule 37 sanctions is DENIED.¹¹

2 Defendants' motion to strike all late-filed papers is GRANTED, as stated at the
3 hearing.

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5 **IT IS SO ORDERED.**

6 Dated: September 19, 2005



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PHYLLIS J. HAMILTON
United States District Judge

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27 _____
28 ¹¹ It is not clear why plaintiff moved for sanctions pursuant to Rule 37. Sanctions may be awarded under Rule 37, upon motion, for failure to comply with a discovery order.